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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 522

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

JULIA ANDREWS BRUCE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 21, 1930
CERTIORARI GRANTED DECEMBER 1, 1930

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 522

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

JULIA ANDREWS-BRUCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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Before U. S. Board of Tax Appeals

Docket No. 18202

JULIA ANDREWS BRUCE, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

For taxpayer: Walter M. Anderson, Esq.; Chas. D. Hamel, Esq.; R. B. Goodell, Esq.
For commissioner: L. C. Mitchell, Esq.

Docket entries.

1926
July 3—Petition received and filed.
" 6—Copy of petition served on solicitor.
" 6—Notification of receipt mailed taxpayer.
Sept. 4—Answer filed by Gen. Counsel.
" 9—Copy of answer served on taxpayer. General Cal.
1927
Mar. 22—Hearing date set 5-16-27.
May 3—Motion for a continuance until 9-12-27 filed by taxpayer.
" 7—Granted to Oct. 12, 1927. Both sides notified.
Sept. 22—Order changing hearing date to 11-8-27. Signed & filed. Both sides notified.
Nov. 7—Motion to continue to 1-10-28 or thereafter, filed by taxpayer. Granted to Jan. 17, 1928.
1928
Jan. 17—Hearing had before Mr. Smith on merits. Stipulation of facts filed. Briefs due in 60 days. No exchange.
2 Mar. 9—Brief and findings filed by taxpayer. See 5916.
" 14—Brief filed by G. C. See 5508.
June 14—Findings of fact and opinion rendered.
" 15—Order of redetermination entered.
Dec. 7—Supersedeas bond for $35,000, approved and ordered filed.
" 13—Petition for review by U. S. Cir. Ct. of App. (2d) with assignments of error filed by taxpayer.
" 13—Proof of service filed.
1929
Feb. 15—Agreed motion to enlarge time to 4/1/29 to prepare evidence and transmit record filed.
" 15—Notice of appearance of Chas. D. Hamel & Raymond B. Goodell as counsel for taxpayer filed.
" 13—Order enlarging time to 4-1-29 for preparation of evidence
" and delivery of record entered.

1929

Mar. 19—Motion to enlarge time to 6–1–29 for preparation of evidence and delivery of record filed by G. C.

" 20—Order enlarging time to 6–1–29 for preparation of evidence and delivery of records, entered.

May 29—Motion for extension to July 1, 1929, to prepare statement of evidence and transmit record, with proof of service thereon, filed by G. C.

" 31—Order enlarging time to July 1, 1929, for preparation of evidence and delivery of records, entered.

3 June 21—Motion for extension to Aug. 1, 1929, to file statement of evidence and transmit record, filed by taxpayer.

" 24—Order enlarging time to 8–1–29 to file statement of evidence and transmit record, entered.

Aug. 1—Motion for enlarging time to 8–31–29 to file statement of evidence and transmit record filed by taxpayer.

" 1—Order enlarging time to 8–31–29 to prepare evidence and transmit record, entered.

" 27—Transcript of hearing of Aug. 16, 1929, filed.

" 29—Motion for extension to Sept. 15, 1929, to file statement of evidence and transmit record, filed by taxpayer.

" 30—Order enlarging time to Sept. 16, 1929, for preparation of evidence and transmission of record, entered.

Sept. 14—Motion for extension to Oct. 15, 1929, to file statement of evidence and transmit record, filed by taxpayer.

" 16—Order enlarging time to Oct. 15, 1929, for prepa'tion of evidence and delivery of record, entered.

" 27—Agreed statement of evidence lodged.

" 30—Agreed statement of evidence approved and ordered filed.

" 27—Agreed præcipe filed.

Now, October 3, 1929, the foregoing docket entries certified from the record as a true copy.

[SEAL.] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

4 Before United States Board of Tax Appeals

[Title omitted.]

Petition

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency IT:PA:PYA:ARM, dated May 8, 1926, and as the basis of her proceeding alleges as follows:

(1) The petitioner is a resident citizen of the United States, whose address is North Street, Greenwich, Connecticut.

(2) The notice of deficiency (a copy of which is attached and marked "Exhibit A") was mailed to the petitioner on May 8, 1926.

(3) The taxes in controversy are income taxes for the calendar years 1918 and 1919, and are more than $10,000.00, to wit, $20,705.12.

(4) The determination of tax contained in the notice of deficiency is based upon the following errors:

5 (a) The commissioner erred in adding to the net income reported in the returns filed by the petitioner for the years 1918 and 1919 the sums of $10,623.38 and $21,733.85, respectively, under the general and erroneous description "ore payments from the Youngstown Sheet & Tube Company less return of capital thereon" and in adding to net income reported in the returns filed by the petitioner for the years 1918 and 1919 any sums whatever in respect of the transaction so described.

(b) The commissioner erred in treating as taxable income for the years 1918 and 1919 any portion of the sums of $15,750.00 and $32,383.80, respectively, received by the petitioner during those years as part of the sale price of shares of stock in the Andrews and Hitchcock Iron Company which were sold during the year 1916.

(5) The facts upon which the petitioner relies as the basis of her appeal are as follows:

(a) Prior to March 1, 1913, and continuously to March 11, 1916, the petitioner owned 350 shares of the capital stock of the Andrews and Hitchcock Iron Company, the value of which at March 1, 1913, exceeded the cost of the shares to the petitioner.

(b) At March 11, 1916, the outstanding stock of the Andrews and Hitchcock Iron Company consisted of 4,000 shares.

6 (c) On March 11, 1916, the stockholders of the Andrews and Hitchcock Iron Company sold to the Youngstown Sheet & Tube Company for $2,200,000.00 in cash and a sum to be thereafter paid equal to 60¢ per ton of iron ore to the delivery of which from the Mahoning Ore & Steel Company, the Youngstown Sheet & Tube Company should thereafter be entitled as an incident of the ownership by the Andrews and Hitchcock Iron Company of one-twelfth of the capital stock of the Mahoning Ore & Steel Company, the payments to be made annually on the basis of the ore to the delivery of which the Youngstown Sheet & Tube Company should become entitled during each year.

(d) Prior to March 1, 1913, and continuously to March 11, 1916, Louisa Andrews, mother of the petitioner, owned 1,100 shares of the capital stock of the Andrews and Hitchcock Iron Company, which shares were sold in 1916, as above set forth, and by a bequest in the will of said Louisa Andrews the petitioner received a one-half interest in the estate and became entitled to receive 550/4000ths of the unpaid purchase price at the date of her mother's decease, which occurred March 22, 1917.

(e) During the years 1918 and 1919 the petitioner received as part of the sale price $15,750.00 and $32,383.80, respectively.

7 (f) The aggregate sum of the amounts received by the petitioner prior to December 31, 1919, as part payment of the sale

price of the 350 shares owned prior to March 11, 1916, including her share of the consideration of $2,200,000.00 in cash paid in 1916, was less than the value at March 1, 1913, of said 350 shares.

(g) The aggregate sum of the amounts received by the petitioner prior to December 31, 1919, in respect of the unpaid sale price at the date of her mother's decease was less than the value fixed upon her interest for the purpose of the Federal estate tax.

(h) The petitioner keeps no books and the returns of the petitioner for the years 1916, 1917, and 1918 were made upon the basis of cash receipts and disbursements.

(6) The petitioner prays for relief from the deficiency asserted by the respondent on the following and each of the following particulars:

(a) The petitioner asks that the board find the Commission of Internal Revenue erroneously added to the net income reported by the petitioner in her returns for the years 1918 and 1919, the sums of $10,623.38 and $21,733.85, respectively, under the description "Ore payments from the Youngstown Sheet & Tube Company, less
8 return of capital thereon," and that no part of said sums so added by the Commissioner of Internal Revenue to the petitioner's net income for the taxable years 1918 and 1919, constituted income taxable to her in those years.

Wherefore the petitioner prays that this board may hear and determine the deficiency herein alleged.

WALTER M. ANDERSON,
Counsel for the petitioner.
WALTER M. ANDERSON,
Greenwich, Connecticut.

JULY 1ST, 1926.

[*Duly sworn to by Julia Andrews Bruce; jurat omitted in printing.*]

9 *Exhibit A to petition*

TREASURY DEPARTMENT,
Washington, D. C., May 8th, 1926.

IT:PA:PYA
ARM
MRS. JULIA ANDREWS BRUCE,
North Street, Greenwich, Conn.:

Your claims for abatement of a deficiency in tax amounting to $20,705.12 assessed against you for the taxable years 1918 and 1919 has been carefully considered by this office, and it is proposed to reject the said claims for $20,705.12 as computed upon the enclosed statement.

In accordance with the provisions of section 283 (e) or section 283 (k) of the revenue act of 1926, you are allowed 60 days (not counting Sunday as the sixtieth day) from the date of mailing of this letter within which to file a petition with the United States

Board of Tax Appeals, Earle Building, Washingon, D. C., contesting in whole or in part the correctness of this determination.

If you acquiesce in this determination and do not desire to file such petition, you are requested to execute waiver of your right to file a petition with the United States Board of Tax Appeals on the enclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:PA:
10 PYA:ARM:60D. In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully,

D. H. BLAIR,
Commissioner.
By C. R. NASH,
Assistant to the Commissioner.

Enclosures:
Statement
Waiver—Form A.

Statement

IT:PA:PYA
ARM

In re: Mrs. Julia Andrews Bruce, North Street, Greenwich, Conn.

Year	Deficiency in tax
1918	$9,419.61
1919	11,285.51
	20,705.12

In accordance with the recommendation of the solicitor, your interest in the Andrews-Hitchcock Iron Company was adjusted by providing a sinking fund of 4% instead of 6%, which in your case shows a present new worth of $169,934.73 in lieu of $179,289.13.

11 The deferred payments for purposes of tax were allocated as follows:

Of every dollar received, represented by the 350/4000 interest, $0.32554 represents a return of capital and $0.67446 constitutes capital income. Of every dollar received represented by the 550/4000 interest acquired by inheritance, $0.33099 represents a return of capital and $0.66901 constitutes taxable income.

1918

The depletion sustained in 1918 amounts to $5,126.62.

You are advised that the profit of $17,600.00 from the exchange of stock of the Pittsburgh Coal Company of New Jersey for stock of the Pittsburgh Coal Company of Pennsylvania was eliminated from the 1918 return.

The revised net income for 1918 is $72,787.85.

1919

The depletion sustained in 1919 amounts to $10,649.95. The revised net income for 1919 is $93,975.45.

Payment of the tax should not be made until a bill is received from the collector of internal revenue for your district and remittance should then be made to him.

Now, October 3, 1929, the foregoing petition certified from the record as a true copy.

[SEAL.] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

12 Before United States Board of Tax Appeals

[Title omitted.]

Answer

Filed Sept. 4, 1926

The Commissioner of Internal Revenue, by his attorney A. W. Gregg, general counsel, Bureau of Internal Revenue, for answer to the petition of this taxpayer, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.
2. Admits the allegations contained in paragraph 2 of the petition.
3. Admits the allegations contained in paragraph 3 of the petition.
4. Admits that the commissioner made the adjustments as alleged in paragraph 4 of the petition.

5 (a) and (b). Admits the material allegations of fact contained in paragraphs 5 (a) and (b) of the petition.

13 5 (c) to (h). Denies the material allegation of fact contained in paragraphs 5 (d) to (h) of the petition.

Denies each and every other material allegation of fact contained in the petition.

Wherefore, it is prayed that the commissioner's determination be approved and that the petition be dismissed and the appeal denied.

A. W. GREGG,
General Counsel, Bureau of Internal Revenue.

Of counsel:

A. H. FAST, *Special Attorney, Bureau of Internal Revenue.*

Now, October 3, 1929, the foregoing answer certified from the record as a true copy.

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

14 Before United States Board of Tax Appeals

EDITH ANDREWS LOGAN ET AL.,* PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket Nos. 5508, 5916, 5917, 5918, 6014, 6436, 6437, 6438, 18202.
Promulgated June 14, 1928

Findings of fact and opinion

1. Petitioners sold stock on March 11, 1916, for more than cost and for more than the March 1, 1913, value. A part of the consideration received was a contract providing for future payments as ore was mined. The contents and life of the mine and the annual production were capable of determination. Held, that the contract received had a determinable fair market value at the date of receipt.

15 2. Deferred payments under the contract were based upon the number of tons mined annually from the Mahoning mine, the mineral content of which was susceptible of accurate determination; held, that such portion of the deferred payments received during each year as the number of tons mined during such year bears to the total determined content of the mine constitutes a return of principal and that the balance constitutes a receipt of taxable income.

John W. Ford, Esq., Millard F. Tompkins, Esq., and Walter M. Anderson, Esq., for the petitioners.

L. C. Mitchell, Esq., for the respondent.

These proceedings are for the redetermination of deficiencies in income tax, as follows:

	Year	Deficiency	Overassessment
Edith Andrews Logan, Docket No. 5508:			
(Claim filed)	1915		$18.60
" "	1916		1,441.15
" "	1917		491.73
	1918	$994.05	
	1919	14,277.92	
	1920	6,776.66	
		22,048.63	1,951.48
Henry W. Heedy, Docket No. 5916	1918	424.38	
	1919	291.67	
	1920	272.21	
		988.26	

* The following proceedings were heard with the above and are decided herewith:
Henry W. Heedy, Docket No. 5916.
William J. Hitchcock, Docket No. 5917.
Frank Hitchcock, Docket No. 5918.
William M. Andrews, Docket No. 6014.
Carrie L. Shaw, executrix of the estate of John Shaw, deceased, Docket Nos. 6436, 6437, and 3438.
Julia Andrews Bruce, Docket No. 18202.

	Year	Deficiency	Overassessment
William J. Hitchcock, Docket No. 5917	1918	$7,907.60	
	1919	3,024.06	
	1920	3,144.05	
		14,135.71	
16 Frank Hitchcock, Docket No. 5918	1918	8,483.14	
	1919	4,889.75	
	1920	1,701.20	
		15,074.09	
William M. Andrews, Docket No. 6014	1918	135.80	
	1919	71.19	
	1920	46.76	
		253.75	
Carrie L. Shaw, executrix of the estate of John Shaw, deceased, Docket Nos. 6436, 6437, 6438	1918	518.60	
	1919	147.47	
	1920	77.25	
		743.32	
Julia Andrews Bruce, Docket No. 18202	1918	9,419.61	
	1919	11,286.51	
		20,706.12	

These proceedings were consolidated for hearing and decision. The allegations of error in the several petitions are substantially the same, and are that the commissioner erred (1) in adding certain amounts to the net income reported in the returns filed by the petitioners for the years in question under the general and erroneous description "ore payments received from the Youngstown Sheet & Tube Company, less returns of capital thereon," and in adding to net income reported in the returns filed for the taxable years any sums whatever in respect of the transactions so described; and (2) in treating as taxable income for the taxable years any portion of the sums received by the petitioners during those years as part of the sale price of shares of stock in the Andrews & Hitchcock Iron Company which were sold during the year 1916.

17 FINDINGS OF FACT

1. The petitioners are all citizens of the United States and residents of Youngstown, Ohio, except Julia Andrews Bruce, who is a resident of Greenwich, Connecticut.

2. Prior to March 1, 1913, and continuously to March 11, 1916, Edith Andrews Logan owned 250 shares; her mother, Louisa Andrews, owned 1,180 shares; Henry W. Heedy, 100 shares; William J. Hitchcock, 1,000 shares; Frank Hitchcock, 1,000 shares; the Cleveland Trust Company, trustee for the three children of U. A. Andrews (of which William M. Andrews was one), 120 shares; and Julia Andrews Bruce, 350 shares; constituting all of the capital stock of the Andrews & Hitchcock Iron Company, an Ohio corporation, which at all said times mentioned had 4,000 shares of capital stock issued and outstanding.

3. The Andrews & Hitchcock Iron Company at all times between March 1, 1913, and March 11, 1916, owned, among other assets, a 12 per cent interest in the capital stock of the Mahoning Ore & Steel Company, which controlled under a lease dated April 1, 1895, and running for 97 years after said date, an iron mine located on the Mesaba Range in Minnesota, known as the Mahoning mine.

4. On March 11, 1916, all the stockholders of the Andrews &
18 Hitchcock Iron Company entered into a certain written contract with the Youngstown Sheet & Tube Company, an Ohio corporation, providing for the sale of their stock in the Andrews & Hitchcock Iron Company to the Youngstown Sheet & Tube Company, the material portions of which contract are set forth in the findings of fact in Julia Andrews Bruce and Edith Andrews Logan, executrix, estate of Louisa Andrews, 5 B. T. A. 300. This contract made reference to a written contract dated December 16, 1914, by and between the stockholders of the Mahoning Ore & Steel Company, the material portion of which is also set forth in the findings of fact in the case of Julia Andrews Bruce et al., supra.

5. Under the said contract of March 11, 1916, the Youngstown Sheet & Tube Company paid for all the outstanding stock of the Andrews & Hitchcock Iron Company the sum of two million two hundred thousand ($2,200,000.00) dollars in cash and further covenanted and agreed to and with the vendors of said stocks as additional consideration for the said stock, as follows:

"Fourth. It is understood that said the Andrews & Hitchcock Iron Company is the owner of twelve per cent or three hundred sixty (360) shares of the capital stock of the Mahoning Ore & Steel Company, a corporation of the State of Pennsylvania, having a capital stock of three hundred thousand dollars ($300,000.00) divided
19 into three thousand (3,000) shares of the par value of one hundred dollars ($100.00) each, which said Ore and Steel Company is the owner of certain valuable mines for the production of iron ore, and that the said the Andrews & Hitchcock Iron Company, by an agreement in writing in quintuplicate bearing date of December 16th, 1914, is entitled to take each year a full quota of each grade of ore to be produced by said Ore & Steel Company in proportion to the amount of stock owned by or represented for it, as provided for in said agreement, a copy of which is hereto attached and marked 'Exhibit A' for the purpose of making the same a part hereof; and for the purpose of fixing the balance of the purchase price to be paid by the Youngstown Company, it is therefore further agreed between said parties as follows, to wit:

"'That the Youngstown Company shall, and will each year hereafter, take or cause to be taken the full quota of ore to which the said the Andrews & Hitchcock Iron Company, its successors or assigns, may be entitled, under and by virtue of the terms of said written agreement of December 16, 1914, and shall give the notice provided for in said agreement and will pay or cause to be paid to

said the Dollar Savings & Trust Company for the benefit of said stockholders, and as the balance of said purchase price, each year, on or before thirty days after the close of navigation to the transportation of ore on the Great Lakes, the sum of sixty cents (60¢) per ton for each and every ton of twenty-two hundred forty (2,240) pounds of iron ore so entitled to be taken for such year, and actually delivered by said Ore & Steel Company, it being understood that if any part of the quota for any year be left at the mine by election of the Youngstown Company, the Youngstown Company shall pay on account thereof to the stockholders in the same manner as though the same had been shipped from the mine, but shall not thereafter be required to pay any additional sum on account thereof.'"

6. The said contract of December 16, 1914, between the stockholders of the Mahoning Ore & Steel Company, which was by reference made part of the said contract of March 11, 1916, contained among other provisions the following:

"The tonnage of each grade to be produced annually shall be fixed by the board of directors on or before April 1st, in each year, and notice of the fixing of said tonnage shall be mailed promptly to each stockholder.

"Each of the interests, as hereinbefore set forth, shall be entitled to take a full quota of each grade to be produced, in proportion to the amount of stock owned by or represented for them, and within fifteen days after receipt of notice referred to in preceding paragraph, shall notify in writing the president of said Mahoning Ore & Steel Company, whether or not it elects to take the full quota to which it is entitled. Undesired tonnage, if any, shall be offered pro rata to the other stockholders, and such portion thereof not desired by them can be disposed of by the board of directors by reducing the originally fixed production to the extent of the unaccepted tonnage or in any other manner the board of directors may agree upon.

"The price of ores shall be fixed each year by the board of directors and shall be at or about the cost of production, including all costs, transportation, delivery, handling, etc., to the lower lake ports."

7. The Cleveland Trust Company on January 31, 1918, transferred and assigned to William M. Andrews a 40/4000 interest in the then unpaid portion of the sale price of said stock and terminated the trust with respect thereto.

8. On October 29, 1916, Louisa Andrews assigned and transferred to John Shaw, by way of gift inter vivos, an interest of 80/4000 in the then unpaid portion of the sale price of said stock.

9. The value on March 1, 1913, of the shares of stock owned by the petitioners and sold by them under said contract of March 11, 1916, was in excess of the following sums, respectively:

Edith Andrews Logan	250	shares	$173,089.80
Henry W. Heedy	100	"	69,235.98
William J. Hitchcock	1,000	"	692,359.25

Frank Hitchcock	1,000	shares	$692,359.25
The Cleveland Trust Company, trustee for William M. Andrews	40	"	27,694.37
Julia Andrews Bruce	350	"	244,708.70

22 10. The value on October 29, 1916, of the 80/4000 interest in the unpaid portion of the sale price of said stock acquired by John Shaw by gift from Louisa Andrews on that date was in excess of $11,388.74.

11. Since the sale of said shares of stock under the contract of March 11, 1916, the petitioners have respectively received the following sums on account of the purchase price of said stock, down to and including the year 1920, the amounts shown for 1916 in each case representing the stockholder's share of $2,200,000 paid in cash under the contract of March 11, 1916:

Edith Andrews Logan—	
1916	$137,500.00
1917	9,900.00
1918	11,250.00
1919	8,995.50
1920	5,444.30
Henry W. Heedy—	
1916	55,000.00
1917	3,960.00
1918	4,500.00
1919	3,598.20
1920	2,177.73
William J. Hitchcock—	
1916	550,000.00
1917	39,600.00
1918	45,000.00
1919	35,982.00
1920	21,777.25
Frank Hitchcock—	
1916	550,000.00
1917	39,600.00
Frank Hitchcock—Con.	
1918	$45,000.00
1919	35,982.00
1920	21,777.25
23 William M. Andrews—	
1916	22,000.00
1917	1,584.00
1918	1,800.00
1919	1,439.28
1920	871.09
John Shaw—	
1917	3,168.00
1918	3,600.00
1919	2,878.56
1920	1,742.18
Julia Andrews Bruce—	
1916	192,500.00
1917	13,860.00
1918	15,750.00
1919	12,593.70

12. The total of the sums received by the several petitioners as the result of the sale of said stock owned by them and sold under the contract of March 11, 1916, down to and including the year 1920 was in each case less than the value on March 1, 1913, of the stock sold and less than the cost thereof; and in the case of John Shaw was less than the value of his interest at the date he acquired it by gift from Louisa Andrews.

13. On March 11, 1917, Louisa Andrews, Julia Andrews Bruce's mother, died, leaving a last will and testament which was duly admitted to probate and under which Julia Andrews Bruce received by request a 550/4000 interest in any payments that might subsequently become due under the said contract of March 11, 1916.

14. The value of the said 550/4000 interest so acquired by
24 Julia Andrews Bruce under her mother's will was fixed by the Commissioner of Internal Revenue for the purposes of the Federal estate tax imposed upon the estate of Louisa Andrews at $277,164.50.

15. Since the death of her mother Louisa Andrews on March 22, 1917, Julia Andrews Bruce, down to and including the year 1920, has

received the following sums under said contract of March 11, 1916, on account of the 550/4000 interest in the future payments under said contract acquired by her under her mother's will:

1919	$19,790.10
1920	11,977.49

16. The total of the sums so received by Julia Andrews Bruce since her mother's death by virtue of the 550/4000 interest in the future payments under the contract of March 11, 1916, acquired by Julia Andrews Bruce under her mother's will was less than the value of the said 550/4000 interest as fixed by the commissioner for the purposes of the Federal estate tax upon the estate of Louisa Andrews, and less than the value of said interest at the date it was acquired by inheritance from her mother.

17. The several petitioners, between March 1, 1913, and December 31, 1920, kept no books and their returns for Federal income tax purposes for the years 1916 to 1920, inclusive, were made on the basis of cash receipts anad disbursements.

18. On March 11, 1916, the Mahoning Ore & Steel Company's property consisted of approximately 1,000 acres of leased mineral land and at that time between 400 and 500 acres were totally or practically unexplored.

19. Fifty per cent of the stock of the Mahoning Ore & Steel Company in 1916 was held by the Cambria Steel Company and the remainder by other steel companies.

20. Until 1909 or 1910 the policy of the Mahoning Ore & Steel Company had been one of conservation, the production running between 1,000,000 and 1,500,000 tons per annum.

21. In 1911, 1912, and 1913, owing to the increasing tax burden and the change of the control of the Cambria Steel Company, the company entered upon extensive stripping operations which placed it in a position to produce 3,000,000 tons a year.

22. Under the agreement of December 16, 1914, the amount of tonnage to be produced annually by the Mahoning mine was left to the determination of the board of directors of that company.

23. A difference of opinion existed between engineers and experts qualified by education and training in the iron-mining industry employed by the Mahoning Ore & Steel Company, on the one hand, and by the commissioner, on the other, as to the estimated annual production of the Mahoning mine and its life as of March 11, 1916.

24. Engineers employed by the commissioner estimated that at the date of the contract of March 11, 1916, the ore reserves of the Mahoning Ore & Steel Company were 82,858,535 tons; that the average annual future production from said mine would be 1,841,300 tons; and that the life of the mine was 45 years from March 11, 1916.

25. The estimate mentioned above and adopted by the commissioner as a basis for determining deficiencies in the income tax of the petitioners was based upon data furnished by the engineers of the Mahon-

ing Ore & Steel Company to the respondent to enable him to fix the depletion rate for the Mahoning Ore & Steel Company. It was based upon the content of recoverable ore in only approximately 620 acres out of the entire property leased by the company.

26. Since fixing the deficiency in the case of Edith Andrews Logan, the commissioner in a proceeding in which the depletion rate for the Mahoning Ore & Steel Company was changed, based upon data furnished by the company and the opinions of duly qualified engineers and experts employed by him, found that the life of said mine was 40 years from March 1, 1913, and that the estimated ore reserves of said mine on March 1, 1913, were 88,561,533 tons. The tonnage mined from the Mahoning mine from March 1, 1913, to March 11, 1916, was 5,039,655 tons.

27. The actual ore in tons mined annually for the Mahoning Ore & Steel Company between 1913 and 1926, inclusive, was as follows:

1913	1,515,428	1920	1,720,537
1914	1,212,287	1921	303,020
1915	2,311,940	1922	1,011,204
1916	2,215,788	1923	3,029,865
1917	2,525,144	1924	1,717,092
1918	2,019,481	1925	1,699,133
1919	1,217,167	1926	1,813,811

28. Assuming that the said Mahoning mine had ore reserves on March 11, 1916, of 82,858,535 tons, and further assuming that all said ore would be mined, and 12 per cent thereof, namely, 9,942,664.2 tons, would be delivered to Youngstown Sheet & Tube Company, the total amount which would be received under the provisions of the contract of March 11, 1916, by all the vendors of said stock and their successors in interest would be the sum of $5,965,814.52, at the rate of 60 cents per ton.

29. The present worth of the sum of $5,965,814.52, based upon the assumption that the amount was to be received in equal annual installments during 45 years, discounted at 6 per cent, with provision for a sinking fund at 4 per cent, was on March 11, 1916, $1,942,111.46, which is the value of the contract at March 11, 1916, determined by the commissioner and used by him in computing deficiencies in tax.

28. OPINION

SMITH: In the petition of Edith Andrews Logan it is stated that "the tax in controversy is income tax for the years 1915 to 1920, inclusive, and is more than $10,000, to wit, $22,048.63." The notice of deficiency attached to the petition shows overassessments for the years 1915, 1916, and 1917, covered by claims filed in the aggregate amount of $1,951.48, and deficiencies in tax for the years 1918, 1919, and 1920 in the aggregate amount of $22,048.63. The pleadings do not present basic facts showing that the board has any jurisdiction to determine the correct tax liabilities for the years 1915, 1916, and 1917, and the petitioner in her brief makes no reference to those

years. The appeal is accordingly dismissed in so far as it relates to the years 1915, 1916, and 1917.

The remaining issues presented by these proceedings are the same as those presented in Julia Andrews Bruce et al., 5 B. T. A. 300, wherein we held that the transaction which took place in 1916 was a completed sale and that the amounts of money received by the petitioners during the tax years under the contract of March 11, 1916, were in part a return of capital and in part taxable income. It was argued before the board in those proceedings, as it is argued by counsel for the present petitioners, that the interest of the petitioners in the contract of March 11, 1916, had no fair market value in 1916 and that, therefore, the transaction was not a closed one and
29 that the petitioners were not liable to income tax upon moneys received in future years under the contract until they had recovered back the cost of fair market value on March 1, 1913, whichever was higher. In the opinion we stated:

"The petitioners have also raised the point that there was no market value for the contract right received by Julia Andrews Bruce and Louisa Andrews in 1916. The only testimony offered in support of these contentions was by Hitchcock, former president of the Andrews & Hitchcock Iron Company. This witness testified that in the negotiations for the sale of the stock there was no discussion concerning a full cash payment, because the buyer, the Youngstown Sheet & Tube Company, could not afford to pay cash in full. This is all the testimony offered in support of the allegation that the contract to receive future payments had no market value."

The present petitioners contend that unlike the Julia Andrews Bruce case, supra, they have offered affirmative proof showing that the contract of March 11, 1916, under which their shares of stock were sold, in so far as the future indeterminate payments were concerned, had no fair market value.

Frank Hitchcock, the president of the Andrews & Hitchcock Iron Company, on March 11, 1916, testified at the hearing of the present cases:

"Q. Mr. Hitchcock, at that time, namely, March 11, 1916,
30 did you know of any market where you could have obtained, or did you know of any market where could be sold, an interest of 12% of the stock of the Mahoning Ore & Steel Company?—A. No; not at its value.

"Q. Mr. Hitchcock, in 1916 was there any price established by public sale or sales in the way of ordinary business, of similar contracts to this contract of March 11, 1916, by which the fair market value of the contract at that time, at the time it was made, could be determined?—A. No.

"Q. Was there in 1916 any general market for contracts of this character, and any established or current market price?—A. No."

John B. Putnam, connected with Pickands, Mather & Company, Cleveland, Ohio, likewise testified that in his opinion there was no

fair market for the interests of the several petitioners in the contract of March 11, 1916; that the vendors on any sale of this contract in 1916 could not have readily realized in cash or its equivalent its real value.

J. C. Agnew, mining engineer, was connected with the Mahoning Ore & Steel Company from 1904 to 1923, testified:

"Q. In 1916, was there any price established by public sales or sales in the way of ordinary business, of similar contracts, by which the fair market value of that contract at the time it was made could be determined?—A. No.

31 "Q. Was there in 1916 any general market for contracts of that character and any published or current market price for the same?—A. Not to my knowledge.

"Q. In your opinion, could the vendors or sellers under that contract, or any sale of the contract, have realized in 1916 in cash or its equivalent its real value?—A. No; I do not think so."

Of the above witnesses, Hitchcock and Agnew testified before the board in Julia Andrews Bruce et al., supra. The only additional witness for the petitioners in the present proceedings is John B. Putnam. He did not profess to be an expert on any subject connected with mining and did not claim to have anything more than general information as to any subject connected with these proceedings. He stated that he was generally familiar with iron-ore contracts. He also stated:

"There have been sales of iron-ore mines, but I am not familiar with any except in a general way."

Two mining engineers testified for the respondent that in their opinion it was practicable and feasible to estimate both the reserve and probable life of the Mahoning mine. Both of these men were familiar with the property in controversy. One of the engineers had taken part in formulating the commissioner's determination as to the probable life of and as to the tonnage of ore in the mine.

32 He stated that the pit operated by the Mahoning Company adjoined another pit known as the Hall Rust Mine on adjoining property and that the two properties constituted one mine from a physical standpoint, and that it was the largest developed iron mine in the United States. The iron is found in a well-defined formation and is one of the best grades of iron ore in the United States. Above the iron ore is the surface or overburden of glacial drift, varying from 5 to 30 feet in thickness. He stated:

"The physical conditions make it feasible to estimate the ore content. You can make a very accurate estimate of it. I would say the degree of accuracy obtained in estimating ore reserves in this property will be much higher than at any other mine that I know of because of the geographical conditions and the development of the work, the drill work, and the activity of adjacent properties * * *. I do not know of any mining section where it is as easy to make an estimate of ore reserve as it is on the Mesaba."

The stipulation filed in these proceedings shows that the respondent estimated ore reserves and probable life as of 1916 and also as of 1913. The estimate of reserve in 1913 when modified by the ore mined between 1913 and 1916 is within one-half of one per cent of the 1916 estimate. In 1913 the probable life was estimated at 40 years and in 1916 at 45 years. On this point one of the engineers for the respondent testified:

33 "The commissioner's appraisals of 40 years as of March 1, 1913, and 45 years as on March 11, 1916, are very consistent, because they were made as of different basic dates. In each case you had a different set of facts on which to base the valuation. In the later appraisal you had additional history of three years to consider. The production for those three years was slightly less than 2,000,000 tons a year, and during those three years the demand for iron ore was about the average."

All of the mining engineers who testified before the board agreed that the production of a mine of the character of the Mahoning mine here involved is strongly influenced by the general conditions of business in the country. They were agreed that in times of prosperity the production will be greater than in times of depression. J. C. Agnew, testifying for the petitioners, stated:

"The demand for iron ore bears a very close relation to the general prosperity of the country * * *.

"In estimating the future production of the Mahoning mine as of 1916 the general demand in this country for iron ore would certainly be an important factor. Another important factor would be the condition of the industry in this country, whether times were prosperous or otherwise."

The two Government engineers concurred in this view.

34 Upon the basis of data furnished by the Mahoning Ore & Steel Co., the respondent determined that the ore in place as of March 11, 1916, was 82,858,535 tons. It is in evidence that this estimate did not take into consideration ore, if there was any, in approximately 400 acres of land controlled by the company. No evidence has been adduced before the board that would prove the inaccuracy of the estimate. The doubt, if any exists, is as to the length of time it will take to mine the ore. Upon the basis of data furnished by the Mahoning Co. the respondent estimated that the life of the mine would be 45 years from March 11, 1916, and that the average annual production would be 1,841,300 tons. During the eleven-year period from 1916 to 1926, inclusive, the total production was 19,272,242 tons, or an average annual production of 1,752,000 tons.

The contract which the stockholders of the Andrews & Hitchcock Iron Co. had with the Youngstown Sheet & Tube Co. was that they should receive 60 cents per ton upon their 12 per cent. interest in the ore mined from the Mahoning mine. The important question in the case is as to whether that contract had a fair market value as of

March 11, 1916. The petitioners contend that they could not have gotten a fair market value for their interests in the contract if they had attempted to sell them. Witnesses for the petitioners believed that the true value of the interest of each of the petitioners was much in excess of what each could have sold it for. This question of belief does not, however, in our opinion, satisfactorily establish that the interests had no fair market value. In 1916 it could be
35 foreseen that each of the petitioners would receive considerable amounts of money under the contract during the years immediately succeeding 1916. It is hardly probable that persons conversant with the contract would not have given something for the interests of the several petitioners therein. Statements that the contract had no value because in the opinion of certain witnesses the interests of petitioners therein could not have been sold at their full market value is not satisfactory evidence that they did not have a fair market value.

In support of their contention that the contract of March 11, 1916, had no fair market value in 1916 the petitioners cite the decision of the court in Bourne v. McLaughlin, 19 Fed. (2d) 148. We are of the opinion that that case is readily distinguishable from the cases at bar and is not controlling here. In that case the court expressly stated that the stock could not have been disposed of "except at such a sacrifice as to amount to a virtual donation," and that attempts to sell the stock were unsuccessful. There is no such evidence before the board in the proceedings at bar.

Upon the record made we are of the opinion that the contract received by the petitioners as a part consideration for their holdings in the Andrews & Hitchcock Iron Co. had a determinable fair market value when received by them in 1916. No evidence has been adduced that the determination of the commissioner of the fair market value of the interests of the several petitioners at the basic dates
36 were in error, and in the absence of such evidence the determinations of the respondent of such values are approved.

The petitioners' contention that they derived no taxable income from payments made to them during the taxable years because up to the close of 1920 no one of them had received under the contract the admitted value of the property sold either as of March 1, 1913, or March 11, 1916, is very similar to that which was made before the board in Ruth Iron Co. et al., 4 B. T. A. 1151, wherein it appeared than in January, 1913, the petitioners sold certain ore-bearing property and each of them received in exchange for its or his interest therein a certain amount in cash and 41 noninterest-bearing promissory notes, payable annually thereafter, endorsed by the United States Steel Corporation and further secured by a vendor's lien upon the property. Upon the facts presented we held that the amounts received by the petitioners upon the payment of their respective notes in the years 1919, 1920, 1921, and 1922 in excess of the fair market value of such notes on March 1, 1913, which value was in

excess of cost, was taxable income. One of the petitioners in that case was Francis S. Kosmerl and from the adverse decision of the board appealed the case to the Circuit Court of Appeals for the Seventh Circuit. In an opinion handed down February 18, 1928, the order of the board was affirmed. In the course of the opinion the court stated:

"For petitioner a witness testified generally that at the time the notes were given the ore body was worth more than 35
37 cents per ton. But the ore at that time was plainly not worth that much to the owners, who had optioned it under the lease at 35 cents a ton, not payable in cash, but as and when it should be mined, over a period which, on January 1, 1913, had yet 41 years to run; so that while the lessee had the right to exhaust the property at 35 cents per ton, this might not, and probably would not, have been payable until many years after the date when the lease was abandoned and the sale consummated. So it appears that the actual consideration which passed from the owners was not a present 35 cents per ton, but that price over a period up to 41 years thereafter, thus greatly reducing the 35 cents per ton value of the consideration which passed in payment for the notes.

"And so with respect to the notes themselves, which, by their terms, matured up to 40 years from their date, without interest. That the notes were good is quite beyond dispute—good, however, only for their face value at maturity, but surely not good for their face value when made. That a note, however absolutely good the security, due 40 years from its date, without interest, is not worth its face at time of making is apparent from the mere statement; and so with the notes in question, paid in 1921 and 1922, eight and nine years from their date. Conceding these notes to have been capital assets of the taxpayer on their date, they were capital assets not for their face value but for the materially less amount
38 which the notes were then actually worth; and in their payment at maturity there was plainly gain, profit, or income to the extent of the difference.

"In Platt v. Bowers, 18 F. (2nd) 951, the court dealt with a very similar situation, and held that while the annually maturing obligations represented capital assets, and were not taxable as gains, profits, or income, yet where the obligations were for serial annual payments without interest, under the acts of 1918 and 1921 there was, upon conversion of the obligations through their payment, profit to the extent of the difference between the value of the obligations on March 1, 1913, and the amount so realized thereon."

The above-referred-to case is not an exact parallel to the cases at bar, for there the petitioners parted with a note during each taxable year and received the face value thereof. Here the petitioners parted with shares of stock in Andrews & Hitchcock Iron Company in 1916 for a cash consideration and a contract entitling them to receive an amount per annum to the end of the lease held

by the Mahoning Ore & Steel Co. based upon the amount of ore mined during each year. The number of tons of ore in the mine was susceptible of accurate determination and the amount of the ore to be mined annually over a period of years was likewise susceptible of determination. If the difference between the present worth
39 of the noninterest-bearing notes in 1913 in the Kosmerl appeal and the amount received during the taxable year was income of the taxable year, we think that the application of the same principle to the proceedings at bar requires the petitioners to return as taxable income a portion of the amount of royalties received each year. This was substantially the decision of the Circuit Court of Appeals, Third Circuit, in Kate W. Rosenberger v. McCaughn, March 3, 1928 (not yet reported). The plaintiff in suing to recover the tax paid on amounts received under a mining lease entered into prior to March 1, 1913, claimed that inasmuch as under the Pennsylvania law the lease was treated as a sale of coal in place the payments received should be treated as a return of capital. In the course of the opinion the court stated:

"Reverting to the plaintiff's contention that all payments she had received under the instrument here in question were tax free because they were part payments of the purchase price of property sold prior to March 1, 1913, still—always keeping in view the nature of mining, the source of the proceeds—we think each payment represented in some measure both capital and increment, capital because it stood in the place of coal and increment because in the payments running through ninety-nine years interest on the capital must inevitably have been included, and that this increment or interest was a gain 'derived' within the generalization of the statute 'from any
40 source whatever' and was income in substantially the sense of New Creek Coal Company v. Lederer, 295 Fed. 433 (4 Am. Fed. Tax Rep. 3769). The plaintiff can very properly demand that the capital included in her proceeds from mining shall not be taxed. United States v. Ludey, 274 U. S. 295 (6 Am. Fed. Tax Rep. 6754); New Creek Coal Company v. Lederer, supra. But when the capital in the proceeds has been determined and set aside the balance is income and is the very thing on which the Government lays its hands and exacts a tax. Stratton's Independence v. Howbert, 231 U. S. 399 (3 Am. Fed. Tax Rep. 2883); * * *. See also Florence L. Klein, 6 B. T. A. 617."

At the hearing of these proceedings counsel for the petitioners stated that they desired merely to submit to the board these cases on the sole and particular question whether the 1916 transaction was a closed transaction and that if upon the evidence submitted the board was of the opinion that it was a closed transaction then the deficiencies must be redetermined in accordance with the board's decision in Julia Andrews Bruce et al., supra, in which the same contract was involved. Counsel for the respondent objected, however, to the redetermination of the deficiencies in accordance with the Julia

Andrews Bruce et al., supra, decision and contended that the deficiencies should be redetermined to be the amounts found by the respondent.

In Julia Andrews Bruce et al., supra, we held:

"* * * The commissioner in his determination of the
41 deficiency has determined the fair market value of the right to receive future payments, and from the evidence presented we can not say that his determination is not correct. A portion of each payment under the contract was a return of capital and a portion represented gain. The commissioner has determined what portion is gain by dividing the 1916 value of the contract by the total tonnage to be obtained, reaching the conclusion that the payment for each ton represents 19.53 cents return of principal and 40.47 cents income, or, in other words, that each payment, whether made one year after the agreement was made or 45 years thereafter, is made up 35.554 per cent return of principal and 67.446 per cent income.

"The payments to all the stockholders were estimated by the commissioner to be $132,573.60 annually for 45 years. These payments were reduced to present worth, using a discount of 6 per cent on future payments with a 4 per cent return on sinking fund. It is evident that the present worth of the payment to be received at the end of the first year differs substantially from the present worth of the payment to be received 45 years in the future. It is further evident that the present worth of all of the payments is the sum of the present worth of each annual payment, proper adjustment for the sinking fund being made. In determining what portion of the payment represented a return of the 1916 value, the commis-
42 sioner has made the allocation between principal and gain as if the present value in 1916 of each of the annual payments to be received was exactly the same * * *."

Our question now is whether we were correct in reaching the above conclusion. It will be noted from the foregoing that for the purpose of determining the amount of income received by each petitioner from the royalty payments, the commissioner considered that of each royalty payment received a part represented a return of the value of the contract on April 11, 1916, and the balance represented income. The amount of each royalty payment which represented a return of capital was determined by dividing the fair market value of the contract on April 11, 1916, by the estimated tons of ore in the mine on that date. The difference between the royalty payment of 60 cents and the foregoing amount was taken as the income received on account of each ton of ore mined. The income for a given year was obtained by multiplying the unit of income for a single ton of ore by the total number of tons mined in a given year. The board rejected the respondent's basis and held that—

"The proper manner in which to determine what portion of the payment is principal is to split up the total 1916 present worth into its component parts and to treat the present value of the first year's

payment as a return of principal upon the first 1,841,300 tons (the estimated annual production) mined, the present value of the
43 second year's payment as a return of principal upon the second 1,841.300 tons mined, and similarly each year until the mine becomes exhausted, or the principal is all returned."

In this manner the greater part of the amounts received in the first years would represent a return of principal and a small part income, whereas during the last years of the existence of the contract the reverse situation would be true regardless of the income produced by the contract in the various years. For example, under this theory, the amount to be accounted for each year would be $1,064,600, and in the first year approximately 94 per cent would be considered a return of principal, and approximately 6 per cent income, whereas in the forty-fifth year approximately 6 per cent would represent a return of principal and approximately 94 per cent would represent income.

Does the foregoing decision of the board afford a reasonable basis for the determination of the amount of income of the petitioners from the royalty payments received? It is believed that this question may best be answered by keeping in mind the nature of the asset received when the 1916 transaction was effected. What happened in 1916 was that certain stock was sold for $2,200,000 and a contract which the respondent determined had a fair market value at date of receipt of $1,942,111.46, which value we have approved for lack of evidence showing error on the part of the respondent in making such determination. The contract in question was an income-producing asset in that under its terms the owners
44 thereof were entitled to receive income to the extent of 60 cents a ton on a certain part of the ore that was to be mined and the contract was exhaustible in that it had a value only so long as there remained ore to be mined.

The board is of the opinion that a proper solution to the question of what part of the royalties received constituted taxable income lies in considering the entire amount of royalties received in a given year as includable in gross income and then in permitting a reasonable deduction therefrom in each year for the exhaustion of the contract. Section 213 (a), revenue act of 1918, provides in part that gross income—

"Includes gains, profits, and income derived from * * * trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer * * *."

We can not escape the conclusion that the foregoing provision would require all royalties received to be included in the gross income of the recipient. But all of the amounts received
45 would not be subject to tax for the reason that in the production of this income the asset which produced this income was gradually being exhausted and Congress provided in section 214 (a) (8), revenue act of 1918, that there shall be allowed as a deduction from gross income "A reasonable allowance for the exhaustion * * * of property * * *." No one would seriously question that a contract is property, and we think it equally clear that the contract in question is property which is being exhausted in the production of income and, consequently, that a deduction on account thereof is justified under the foregoing provision of the statute. See Lynch v. Alworth-Stephens Co., 267 U. S. 364. The difference between the royalties received and the allowance for exhaustion would constitute gain derived from capital which would satisfy the classic definition of income as laid down in Stratton's Independence v. Howbert, 231 U. S. 399, and since often reiterated, to the effect that income is the "gain derived from capital, from labor, or from both combined." Here the gain derived from capital, which capital is in the form of a contract which was received in part payment for stock which was sold and which will be productive of income until exhausted.

Our next question is what constitutes a reasonable allowance for the exhaustion of the contract. Since the value attaching to the contract is an account of royalties to be received as the ore is mined, we are of the opinion that a reasonable allowance in each year is determinable upon the basis of the ore mined. It is true that we are not here seeking to determine depletion in the case of a mine, yet
46 the relationship between the exhaustion of the mine and the exhaustion of the contract are such that we think the same principles would be applicable in each case. The method for computing the deduction for the depletion of mineral deposits, as set out by the commissioner in his regulations, is on the basis of the annual production. Article 210 (b), Regulations 45, provides:

"When the value of the property at the basic date has been determined, depletion for the taxable year shall be determined by dividing the value remaining for depletion by the number of units of mineral to which this value is applicable, and by multiplying the unit value for depletion, so determined, by the number of units sold within the taxable year. * * *"

See also articles 201, 202, 203, and 204 of the same regulations. In New Creek Co. v. Lederer (C. C. A.), 295 Fed. 433, the court had before it the question of the reasonableness of the commissioner's regulations with respect to depletion under the revenue act of 1916, which embody the same principle which appears in the aforementioned regulations (in so far as material to this discussion), the Government there contending that—

"Royalties represented both capital and income and that the allowance for capital depletion which the statute authorized was to be determined by the value in the ground of each ton of coal on
47 March 1, 1913, * * * * multiplied by the number of tons mined in the year for which the tax was payable."

In approving the commissioner's regulations as providing a reasonable depletion allowance the court said:

"* * * On the theory of the statute, as we read it, depletion allowance was intended as a return to the taxpayer of the original cost of the coal so that he may be taxed not on the whole of its sale price in the event that he is an operating owner, or on the full amount of royalties if he is a lessor, but that he may be taxed on the difference between the cost (capital) and the sale price or royalties received (income). (Of course, in estimating income on sale price other factors enter.) If he were allowed to deduct in each year the full amount of the sale price or the full amount of the royalties received (as the plaintiff here claims), the practical effect would be that he would, for many years, pay no tax at all, and this regardless of the fact that the total sale price (or total royalties) may, ton by ton, show a profit over the original capital cost. It is this profit or net income annually earned which the act taxed annually. And in this regard we see no distinction in the application of the principle to a mine owner whose income is royalties and to a mine owner whose income is derived from working the mines and selling the coal. The only difference is that in the latter more
48 factors enter into the calculation. The principle is the same.

"We do not find that the rules and regulations prescribed by the Secretary of the Treasury for the enforcement of the allowance for depletion under the provisions of the revenue act of 1916 are, in view of the subject matter of taxation, unreasonable, or that by these rules the taxable was deprived of the deduction which the statute allowed."

Likewise, in Lynch v. Alworth-Stephens Co., supra, where it was held that a lessee of a mine is entitled to an allowance for depletion, the court said:

"It is said that the depletion allowance applies to the physical exhaustion of the ore deposits, and, since the title thereto is in the lessor, he alone is entitled to make the deduction. But the fallacy in the syllogism is plain. The deduction for depletion in the case of mines is a special application of the general rule of the statute allowing a deduction for exhaustion of property. While respondent does not own the ore deposits, its right to mine and remove the ore and reduce it to possession and ownership is property within the meaning of the general provision. Obviously, as the process goes on, this property interest of the lessee in the mines is lessened from year to year, as the owner's property interest in the same
49 mines is likewise lessened. There is an exhaustion of property in the one case as in the other; and the extent of it, with the

consequent deduction to be made, in each case is to be arrived at in the same way, namely, by determining the aggregate amount of the depletion of the mines in which the several interests inhere, based upon the market value of the product, and allocating that amount in proportion to the interest of each severally considered."

The board is convinced that the foregoing principles which were considered applicable in determining a reasonable allowance for the depletion of a mine would apply with equal force in determining the reasonable allowance for the exhaustion of a contract which is dependent for its value upon the right to receive a royalty upon the content of a mine as the ore is mined and which value will be reduced or exhausted as the ore is taken from the ground.

While in the instant case the respondent divided the royalties received as between a return of capital and income, the result reached is the same as if the entire royalties received had been included in gross income and an allowance for exhaustion of the contract treated as a deduction from this gross income. In fact, the end sought in an exhaustion allowance is to have the capital sum invested in a wasting asset returned to the taxpayer as a charge against income earned by the asset and in this way avoid taxing a return of capital. The entire income earned is not taxable, but only so much thereof as does not represent a return of capital. The return
50 of capital is represented in the case at bar by the exhaustion allowance, which, when deducted from the total royalties received, will produce the same amount of taxable income as determined by the respondent. See the Royal Collieries Company, 1 B. T. A. 369. The action of the respondent is accordingly sustained.

In the instant proceedings we are not attempting to lay down a rule for the determination of a reasonable amount for depletion in the case of a mine. Nor do we attempt to determine what would be a reasonable allowance for the exhaustion of a contract where the facts are substantially different from those which obtain in the instant proceedings. All that we do determine is that the method invoked by the respondent of computing the income from the contract is reasonable and should be sustained in the absence of evidence of error on the part of the respondent in making such determination.

The foregoing principles, as to the manner in which income from the contract shall be reported are, of course, inconsistent with the method approved by the board in Julia Andrews Bruce et al., supra, in that under the Bruce case neither the income to be reported nor the allowance for exhaustion bear any necessary relation to the income received in a given year, nor to the extent in which exhaustion has been suffered in the production of this income. It is true that in the valuation of this contract we have based our conclusion as to the fair market value upon the basis of the present worth of the royalties which it was estimated would be received over the
51 life of the contract, but because we followed this method of valuation does not mean that where, for example, the same

tonnage of ore was mined in the first year and in the last year of the existence of the contract the greater part of the royalties in one case would be capital and in the other case income. The net income in each case would be the same. The value which we arrived at was such a value as we considered would have resulted had the contract been offered for sale by a person willing to sell and had been acquired by a person willing to buy. In effect, the method followed and the result reached is not essentially different from that in the case of the valuation of a leasehold at March 1, 1913. In such case a value is often assigned to the leasehold for the reason that had it been necessary to renew the lease on that date the rental to be paid would have been greater than was being paid under the terms of the lease negotiated prior to March 1, 1913, and, consequently, we say that there will be a saving over the remaining life of the lease of the difference between the two rental amounts, which reflects a March 1, 1913, value of the leasehold. Even though such value may be arrived at on the basis of the present worth of the savings over the period of years, we have never heard it contended that the deduction allowable in a given year on account of the exhaustion of such a leasehold value should bear any relation to the present worth value of the saving for such year. The basis for exhaustion of such a leasehold which has been recognized repeatedly by the board and the courts is either a time or production basis depending upon
52 the nature of the asset, and that regardless of the fact that in determining the March 1, 1913, value the value of the saving for the first year would be greater than for any succeeding year. We do not conceive that the situation with respect to the exhaustion of the contract in question would have been different had the valuation which we arrived at been upon the basis of an offer to buy the contract rather than the present worth method. An offer to buy would necessarily have been predicated upon the profits to be realized from the contract and the profits which were expected to be realized one year hence would have been a greater present value than the profits which were expected to be realized forty-five years from that time, yet had the valuation been fixed on such an offer it is hardly to be supposed that it would be seriously contended that the income to be reported and the exhaustion to be allowed would bear any relationship to such values. To the extent, therefore, that the opinion in Julia Andrews Bruce et al., supra, is in conflict with the views hereinbefore expressed the same is overruled.

Reviewed by the board.

Judgments will be entered for the respondent.

Dissenting opinion

PHILLIPS, dissenting in part: The difficulty I encounter in the present case is in reconciling the method by which the capital value of the contract is determined with the method by which the capital

53 returned by each payment is computed. In valuing the contract a method is used which recognizes that payments to be received in the future must be discounted to their present value. (Findings 28 and 29.) Upon this basis it is recognized that the right to receive royalties from the ores to be mined in the first year of operations is much more valuable than the right to receive royalty from an equal number of tons of ores to be mined several years later. The value of the contract is determined to be the sum of the present value of these future payments. (Findings 29.) In this manner the value of a contract is determined by assigning a capital value to the royalty upon each ton of ore to be mined in the future, a greater capital value per ton being assigned to the royalty from the first ore mined than to the royalty from the ore which is mined later. It seems to me that if we are to use this method of determining the capital value of the contract we are not justified in departing from it when the royalties are received and we are called upon to determine what portion of the amount received from each ton mined represents capital value.

The rule adopted by the commissioner and followed by the board by which a uniform value is assigned to the royalty right in each ton of ore, whether mined in the first year or the last year of operations, may be proper in a large majority of cases, but it seems to me that it cannot properly be applied where, as here, in determining the capital value of the contract capital values have been assigned to the right to receive royalties on these ores which vary according to the
54 time when the ores will be mined. It is my opinion that in such a case the petitioners have received income only to the extent that the royalties received in the taxable years exceed what has been determined to be the present value at the time the contract was made of the right to receive the royalties on an equal number of tons of ore. The computation of income upon this basis is no more difficult than the computation of the present worth of the right to receive royalties; it requires, in fact, nothing more than the use of the same tables used in the computation of value.

This principle has received the sanction of the courts in Hull v. McHale (United States District Court for the Eastern Division of the Northern District of Illinois) not reported, which was affirmed by the Circuit Court of Appeals for the Seventh Circuit in McHale v. Hull, 16 Fed. (2nd) 781, and followed in Spalding v. Reinicke, not reported, which arose in the same district.

TRAMMEL agrees with this dissent.

Now, October 3, 1929, the foregoing findings of fact and opinion certified from the record as a true copy.

[SEAL.] B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

55 Before United States Board of Tax Appeals, Washington

Docket No. 18202

JULIA ANDREWS BRUCE, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Order of redetermination

Pursuant to the board's findings of fact and opinion, promulgated June 14, 1928, it is

Ordered and decided that, upon redetermination, there are deficiencies for the years 1918 and 1919 in the amounts of $9,419.61 and $11,285.51, respectively.

(Signed) CHARLES P. SMITH,
Member, United States Board of Tax Appeals.

Entered June 15, 1928, Washington, D. C.

Enter:

Now, October 3, 1929, the foregoing order of redetermination certified from the record as a true copy.

[SEAL.] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

56 Before United States Board of Tax Appeals

[Title omitted.]

Petition for review

TO THE HONORABLE THE JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT:

Your petitioner, Julia Andrews Bruce, respectfully shows:

I. JURISDICTION FOR REVIEW

This is a proceeding pursuant to the provisions of section 1001 of the revenue act of 1926, as amended, for review by the United States Circuit Court of Appeals for the Second Circuit of a decision of the United States Board of Tax Appeals entered on the 15th day of June, 1928, redetermining deficiencies in income tax against your petitioner for the calendar years 1918 and 1919 in the amount of $9,419.61 and $11,285.51, respectively.

Your petitioner at the present time is a citizen of the United States and is an inhabitant of the town of Greenwich in the State of Connecticut.

57 II. NATURE OF CONTROVERSY

The controversy before the United States Board of Tax Appeals concerned the propriety of the action of the Commissioner of Internal Revenue in treating as taxable income for the years in question any portion of the sums received by petitioner during those years as part of the sale price of shares of stock in the Andrews & Hitchcock Iron Company, which were sold during the year 1916 under the following circumstances:

Prior to March 1, 1913, and continuously to March 11, 1916, petitioner owned 350 shares and her mother, Louisa Andrews, owned 1,100 shares of the capital stock of the Andrews & Hitchcock Iron Company, an Ohio corporation, which at all times mentioned had 4,000 shares of capital stock issued and outstanding. Said Andrews & Hitchcock Iron Company at all times between March 1, 1913, and March 11, 1916, owned among other assets twelve per centum (12%) of the capital stock of the Mahoning Ore & Steel Company, a Pennsylvania corporation, which held under lease dated April 1, 1895, and running for 97 years after said date, certain mineral lands in the Mesaba Range of Minnesota.

Under a certain contract of December 16, 1914, between the stockholders of said Mahoning Ore & Steel Company, including said Andrews & Hitchcock Iron Company, said stockholders agreed in substance (1) that the board of directors should fix on or before April 1, of each year, the annual tonnage of iron ore to be pro-
58 duced; (2) that each stockholder should be entitled to take a full quota of each grade of iron ore to be produced annually in proportion to the amount of stock owned by him; (3) that the price of said ore should be fixed each year by the board of directors at or about the cost of producing, including all costs, transportation, delivery etc., to the lower lake ports.

On March 11, 1916, all of the stockholders of said Andrews & Hitchcock Iron Company, including petitioner, and her mother, Louisa Andrews, entered into a certain written contract with the Youngstown Sheet & Tube Company, an Ohio corporation, to sell to said corporation all of the shares of capital stock held by them in said Andrews & Hitchcock Iron Company. The contract of March 11, 1916, incorporated by reference the provisions of the contract of December 16, 1914, above mentioned. In consideration for said sale, said Youngstown Sheet & Tube Company paid for the benefit of the stockholders of said Andrews & Hitchcock Iron Company $2,200,000 in cash on or before April 11, 1916, and further, by way of additional consideration for said sale and as the balance of said purchase price covenanted and agreed to pay to the Dollar Savings & Trust Company of Youngstown, Ohio, for the benefit of said stockholders of the Andrews & Hitchcock Iron Company each year, on or before thirty days after the close of navigation to the transportation of ore on the Great Lakes, the sum of sixty cents (60¢) for each and every

ton of 2,240 pounds of iron ore which it might be entitled to take from the Mahoning Ore & Steel Company and actually delivered by said company.

59 Louisa Andrews, the mother of the petitioner, died on March 22, 1917, leaving a last will and testament under which the petitioner acquired by bequest a 550/4000ths interest in any payments that might subsequently become due under the contract of March 11, 1916. This interest was valued by the Commissioner of Internal Revenue for purposes of the Federal estate tax imposed on the estate of Louisa Andrews at $277,164.50.

The value on March 1, 1913, of the 350 shares of stock of the Andrews & Hitchcock Iron Company owned by petitioner and sold by her by said contract of March 11, 1916, was greater than cost, and was also greatly in excess of $234,703.70, which is the aggregate amount received by petitioner over the period down to and including the year 1919 in respect of the purchase price of said 350 shares of stock, as follows:

1916	$192,500.00	(Petitioner's share of $2,200,000 paid in cash under contract of March 11, 1916.)
1917	13,860.00	
1918	15,750.00	
1919	12,593.70	
Total	$234,703.70	

Petitioner, prior to and including the year 1919, received the following sum under said contract on account of the 550/4000ths
60 interest in the future payments under said contract acquired by her by bequest:

1919	$19,790.10

The sum so received by petitioner since her mother's death was less than the value of the said 550/4000ths interest as fixed by the Commissioner of Internal Revenue for the purposes of the Federal estate tax upon the estate of Louisa Andrews and less than the value of said interest at the date of acquisition by petitioner.

The petitioner, between March 1, 1913, and December 31, 1919, kept no books, and made her returns for Federal income tax purposes for the years 1916 to 1919, inclusive, upon the basis of cash receipts and disbursements.

In her income tax returns for the years 1918 and 1919 the petitioner did not report as income any portion of the amounts received by her during those years under the contract of sale of March 11, 1916. She contends that the future purchase price to be paid by the Youngstown Sheet & Tube Company under said contract (hereinafter referred to as "the obligation of the Youngstown Company") had, as a matter of fact, at the date of the sale no fair market value and was, in any event, not the equivalent of cash; that there was, therefore, as a matter of law, no sufficient basis for the determination of gain or loss upon the sale in 1916 in the case of a return made upon the basis

of cash receipts; and that she is entitled to treat all receipts from the sale of stock (including her share of the $2,200,000.00 paid by the Youngstown Company in 1916) as a return of capital until she
61 has recovered the cost or other statutory basis of the property disposed of. The petitioner further contends that even if the obligation of the Youngstown Company had, as a matter of fact, a fair market value or a determinable equivalent in cash at March 11, 1916, the Commissioner of Internal Revenue did not correctly determine that value or equivalent or, as a matter of law, correctly allocate as between income and the return of such value or equivalent (whatever its amount) the cash payment received by the petitioner during the years under review in liquidation of said obligation.

The Commissioner of Internal Revenue (1) treated the obligation of the Youngstown Company as having a fair market value at March 11, 1916, and (2) purported to determine that value at $1,942,111.46. He further determined not only (3) that the petitioner was not entitled to the return of her capital or statutory base prior to the realization of income, but also (4) that (irrespective of the time when it was or might be expected to be received) a fixed proportion of each dollar received by petitioner from said Youngstown Company represented return of capital, to wit, 32.554 per cent, and the remainder a realization of income, to wit, 67.446 per cent. (These percentages varied slightly in the case of payments received on account of the interest acquired by the petitioner under the will of her mother.) Accordingly, he determined that petitioner realized income from the payments during the years in question as follows:

1918	$10,623.38
1919	21,733.85

62 These were the final determinations, and he proposed the additional taxes now in controversy against petitioner in consequence of such determinations.

Upon appeal to the United States Board of Tax Appeals, the final administrative agency in the executive branch of the Government, said board affirmed the action of the Commissioner of Internal Revenue in all particulars.

The sole question here is whether the action of the board was proper under the law and upon the evidence.

III. ASSIGNMENT OF ERRORS

In affirming the action of the Commissioner of Internal Revenue and in purporting to find and determine a fair market value in 1916 for the obligation of the Youngstown Company, and in determining that a certain proportion, to wit, 32.554 per cent, of each payment received by petitioner represented a return of capital and the remainder, to wit, 67.446 per cent, represented taxable income, the United States Board of Tax Appeals committed the following errors, upon which petitioner relies as the basis of this proceeding:

ERRORS OF FAILING TO MAKE FINDINGS OF FACTS REQUESTED

(1) Said board erred in that it failed to find that the obligation of the Youngstown Company to make future payments under said contract of March 11, 1916, had no fair market value at
63 the time said contract was made, though requested so to find, and though the fact was material and fully established by evidence. (Petitioner's proposed Finding No. 19.)

(2) Said board erred in that it failed to find that said obligation of the Youngstown Company was not substantially the equivalent of cash and/or was not readily convertible into cash in the year 1916, though requested so to find and though such facts were material and fully established by evidence. (Petitioner's proposed Finding No. 20.)

(3) Said board erred in that it failed to find that in 1916 there was no price established by public sales or sales in the way of ordinary business of contracts reasonably similar to the contract of March 11, 1916, by which the fair market value of the obligation of the Youngstown Company at the time and place indicated could be determined; and that, in 1916, there was no general market for obligations of the character here involved and no established or current price for such obligations. The board was requested so to find and failed to do so, though such facts were material and fully established by evidence. (Petitioner's proposed Finding No. 21.)

(4) Said board erred in that it failed to find that in 1916 the vendors under the contract of March 11, 1916, on any sale or transfer of their interests thereunder could not have realized in cash or
64 its equivalent the real value or substantially the real value of said interests, though requested so to find and though such facts were material and fully established by evidence. (Petitioner's proposed Finding No. 22.)

(5) Said board erred in that it failed to find that on March 11, 1916, approximately 240 acres out of 1,000 acres of mineral land leased by the Mahoning Ore & Steel Company were being actively operated, though requested so to find and though such fact was material and fully established by evidence. (Petitioner's proposed Finding No. 25.)

(6) Said board erred in that it failed to find that the annual production from the properties leased by the Mahoning Ore & Steel Company would necessarily vary from year to year, based upon conditions in the steel business and upon the needs and requirements of the majority stockholders of said Mahoning Company for the ore produced by that company, though requested so to find and though such facts were material and fully established by evidence. (Petitioner's proposed Finding No. 29.)

(7) Said board erred in that it failed to find that it was impossible in 1916 to determine with reasonable certainty the future annual

production of the Mahoning Ore & Steel Company, though requested so to find and though such fact was material and fully established by evidence. (Petitioner's proposed Finding No. 30.)

65 ERRORS IN FAILING TO MAKE WRITTEN FINDINGS OF FACTS ON WHICH BOARD RELIED IN THE DETERMINATION OF DEFICIENCIES

(8) Said board erred in that it failed to make and to include in its written findings of fact a specific finding on whether or not the obligation of the Youngstown Company under the contract of March 11, 1916, had a fair market value at that date, such finding being necessary to a decision of the question before said board, and said board being required by law to make such specific written finding of fact.

(9) Said board erred in that it failed to make and to include in its written findings of fact a specific finding as to the alleged present market value in dollars at March 11, 1916, of said obligation of the Youngstown Company, such finding being necessary to a decision of the question before the board, and the board being required by law to make such specific written finding of fact.

(10) Said board erred in that it failed to make and to include in its written findings of fact a specific finding of the respective proportions of return of capital and taxable income held by it to be represented by each payment made to petitioner by the Youngstown Sheet & Tube Company under said contract of March 11, 1916, such finding being necessary to a decision of the question before said board,
66 and said board being required by law to make such specific written finding of fact.

(11) Said board erred in that it failed to make and to include in its written finding of fact a specific finding of the recoverable ore content at March 11, 1916, of the lands leased by the Mahoning Ore & Steel Company and of the life of said deposits from March 11, 1916, upon which factors said board purported to predicate its value of the obligation of the Youngstown Company under the contract of March 11, 1916, though such factors were required to be determined under the method pursued by the board in purporting to determine the value of said obligation, and the board being required by law to make such specific written findings of fact.

ERRORS IN STATING FACTS AND EVIDENCE RELIED UPON BY THE BOARD IN ITS OPINION IN DECIDING THE CAUSE

(12) Said board erred in assuming and relying on the assumption that it could determine with reasonable accuracy the future annual production of the Mahoning Ore & Steel Company, in tons, when in fact such production was determinable only at will of the directors of that company.

(13) Said board erred in stating in its opinion and relying upon said statement in deciding the issue, that no evidence had been ad-

duced before the board to prove the inaccuracy of the commis-
67 sioner's estimate of 82,858,535 tons of ore as of March 11, 1916,
the evidence clearly establishing the inaccuracy of said esti-
mate.

(14) Said board erred in assuming and relying on the assumption that the commissioner's determination in fixing the deficiencies in this case that the life of the ore reserves of the Mahoning Ore & Steel Company would be 45 years from March 11, 1916, was correct, when the undisputed evidence shows that since fixing the deficiencies in this case the commissioner in a proceeding to redetermine the depletion rate of the Mahoning Ore & Steel Company found that the life of said mine was 40 years from March 1, 1913.

(15) Said board erred in stating in its opinion that the obligation of the Youngstown Company had a definite present fair market value at March 11, 1916, said statement not being supported by a finding of fact and being contrary to the evidence adduced before the board.

(16) Said board erred in stating in its opinion that there was no evidence before the board to show that the obligation of the Youngstown Company could not have been disposed of except at a substantial sacrifice, evidence having been adduced by petitioner clearly establishing that said obligation could not have been sold except at such a sacrifice.

(17) Said board erred in stating in its opinion that

"What happened in 1916 was that certain stock was sold
68 for $2,200,000 and a contract which the respondent determined
had a fair market value at date of receipt of $1,942,111.46,
which value we have approved for lack of evidence showing error on the part of the respondent in making such determination,"

said board having made no finding of the market value of said contract and the evidence before said board clearly establishing that no fair market value could be determined for the obligation of the Youngstown Company under said contract.

(18) Said board erred in stating in its opinion that one of the respondent's witnesses (meaning E. J. Stack) had taken part in formulating the commissioner's determination as to probable life of and as to the tonnage of ore in the mine, whereas it appears from the testimony of said witness on cross-examination that he had no part in fixing the valuation in this case and was never in the Mahoning property before 1925.

ERRORS IN ADMISSION OF EVIDENCE

(19) Said board erred in admitting in evidence any testimony and statement of facts tending to show the estimate of the ore content of lands leased by the Mahoning Ore & Steel Company and the average annual future production from said lands and the estimated life of the mineral content of said lands from March 11, 1916, said evidence

being incompetent, irrelevant, and immaterial on the question
69 of the present fair market value in 1916 of the obligation of the Youngstown Company under the contract of March 11, 1916, and said evidence having been duly objected to by attorneys for petitioner.

(20) Said board erred in admitting in evidence testimony and statements of facts that the present worth of the sum of $5,965,814.52, discounted at 6%, with provision for sinking fund at 4% over 45 years, was on March 11, 1916, $1,942,111.46, said evidence being irrelevant and immaterial, since the evidence shows that the estimate of $5,955,814.52 would not be received in equal annual installments over a period of 45 years, and said evidence having been duly objected to by attorneys for the petitioner.

(21) Said board erred in admitting in evidence testimony with respect to whether or not there was a possible market for iron-ore mines in the Mesaba Range of Minnesota, said evidence being incompetent, irrelevant, and immaterial on the question of whether or not the obligation of the Youngstown Company had a present fair market value in 1916, and said evidence having been duly objected to by attorneys for petitioner.

ERRORS IN CONCLUSIONS OF LAW

(22) Said board erred in holding, solely upon the basis of an estimate of ore reserves and hypothetical future production derived from data compiled for the purpose of fixing a depletion rate as at March 1, 1913, for Mahoning Ore & Steel Company and con-
70 trary to the competent and uncontroverted evidence adduced before it, that the obligation of the Youngstown Company had a determinable fair market value at March 11, 1916.

(23) Said board erred in holding that the opinions of expert witnesses and the other evidence before the board were insufficient to establish that the obligation of the Youngstown Company had no fair market value on March 11, 1916, said evidence being fully competent to establish that fact and said evidence being uncontradicted and fully establishing that fact.

(24) Said board erred in holding that the making of the contract of March 11, 1916, was a closed transaction in respect of which loss or gain might arise and that the performance of that contract was a separate transaction or series of transactions from which gain arose.

(25) Said board erred in that it treated the contract of March 11, 1916, as a gain or loss transaction for that year, as above mentioned, and at the same time refused to allow the petitioner to recover the value of property determined by the board to have been received by her, before taxing petitioner further with respect to that property.

(26) Said board erred in its method of determining the income of petitioner from the payments made by the Youngstown Company

under said contract, in that said board failed to allow to petitioner a return of the cost or March 1, 1913, value, or other basis as provided by law before determining the taxable net income of petitioner.

(27) Said board should have held that petitioner was entitled under the sixteenth amendment to the Constitution and the revenue act of 1918 to recover the cost or other basis to her of the obligation of the Youngstown Company under the contract of March 11, 1916, before she should be deemed to have realized income from any payments to her pursuant to that obligation.

(28) Said board erred in determining that of the payments received by petitioner as follows:

1918	$15,750.00
1919	32,383.80

the following, or any part thereof, represented taxable net income:

1918	$10,623.38
1919	21,733.85

(29) The board erred in holding that the amount of ore to be mined annually over a period of years was susceptible of determination, although such a conclusion was not warranted by the evidence adduced before it.

(30) Said board erred in approving as the fair market value of the obligation of the Youngstown Company an amount computed by the commissioner solely upon the basis of an estimate of ore reserves and hypothetical future production derived from data compiled for the purpose of fixing a depletion rate as at March 1, 1913, for Mahoning Ore & Steel Company, it appearing from the finding of fact and uncontroverted evidence as to annual production that the commissioner subsequently to computing the deficiencies made an entirely different and necessarily inconsistent and conflicting estimate of future production in a proceeding in which he redetermined and changed the depletion rate for Mahoning Ore & Steel Company.

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(31) Said board erred in holding that the gross amount received by the petitioner from Youngstown Sheet & Tube Company under the contract of March 11, 1916, represented royalties received and includable in gross income, and that the petitioner was entitled to an allowance of a deduction therefrom under section 214 (a) (8) of the revenue act of 1918, when in fact such receipts were not royalties and were not gross income under the revenue act of 1918.

(32) Said board erred in that, although in determining the capital value of the obligation of the Youngstown Company under the contract of March 11, 1916, it had assigned different capital values to each estimated annual payment varying according to the time when it would in theory be received, it ignored these capital values when it came to determine the amount which should be considered a return of capital on each annual payment as and when payments were re-

ceived and held that a fixed proportion of each payment 60 cents (determined by dividing the fair market value of the obligation of the Youngstown Company at March 11, 1916, by the estimated
73 tons of ore in the reserves of the Mahoning Ore & Steel Company at that date) represented a return of capital.

(33) Said board erred in failing and refusing to give effect to the finding that the petitioner reported her income on the cash receipts and disbursements basis in that it treated as the equivalent of cash a mere contractual right and concluded that the receipt of a nonnegotiable agreement of the kind here involved for the contingent future payment of cash gave rise to taxable income or constituted a taxable closed transaction prior to the time income was received by petitioner in cash.

Wherefore your petitioner prays that this court may review the determination of the United States Board of Tax Appeals in this cause and reverse the decision of said board because of the errors aforesaid, and direct said board to redetermine the deficiencies against your petitioner on the basis that the obligation of the Youngstown Sheet & Tube Company under the contract of March 11, 1916, had no fair market value on that date; and/or that this court may direct and grant such other and further relief as to it may appear proper in the premises.

December 12, 1928.

WALTER M. ANDERSON,
Greenwich, Connecticut, Attorney for Petitioner.
RAYMOND B. GOODELL,
Attorney for Petitioner,
56 Pine Street, New York, New York.

74 [*Duly sworn to by Walter M. Anderson; jurat omitted in printing.*]

Now, October 3, 1929, the foregoing petition for review certified from the record as a true copy.

[SEAL.] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

75 Before United States Board of Tax Appeals

Docket No. 18202

JULIA ANDREWS BRUCE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Statement of evidence

Filed Sept. 30, 1929

The above cause came on for hearing before the Honorable Charles P. Smith, member of the United States Board of Tax Appeals, upon

the 17th day of January, 1928, there being present petitioners by their counsel, Mr. Tompkins, Mr. Ford, and Mr. Anderson, and respondent by his attorney, Mr. Mitchell.

The above cause at said hearing was consolidated for purposes of hearing and decision with the following cases then pending before the Board of Tax Appeals:

Edith Andrews Logan	Docket No.	5508
Henry W. Heedy	" "	5916
William J. Hitchcock	" "	5917
Frank Hitchcock	" "	5918
William M. Andrews	" "	6014
Carrie L. Shaw, executrix	" "	6436, 6437, 6438

76 Thereupon there was filed with the board the following agreed statement of facts. By agreement of the parties the same was received in evidence and made a part of this record.

AGREED STATEMENT OF FACTS

It is hereby stipulated and agreed by and between counsel for the taxpayer-appellant and the Commissioner of Internal Revenue in the above-entitled case that for the purpose of the hearing of said case the following facts shall be taken as true without the necessity of introducing evidence, subject, however, to the right of either party to raise the question of the materiality of any facts so stipulated.

1. Prior to March 1, 1913, and continuously to March 11, 1916, the taxpayer appellant owned 350 shares, and her mother, Louisa Andrews, owned 1,180 shares, of the capital stock of the Andrews & Hitchcock Iron Company, an Ohio corporation, which, at all said times mentioned, had 4,000 shares of capital stock issued and outstanding.

2. The Andrews & Hitchcock Iron Company at all times between the 1st day of March, 1913, and the 11th day of March, 1916, owned, among other assets, a 12% interest in the capital stock of the Mahoning Ore & Steel Company, which controlled, under a lease dated April 1, 1895, and running for 97 years after said date, an
77 iron mine located on the Mesaba Range in Minnesota, known as the Mahoning mine.

3. On the 11th day of March, 1916, all the stockholders of the Andrews & Hitchcock Iron Company, including the taxpayer appellant and her mother, Louisa Andrews, entered into a certain written contract with the Youngstown Sheet & Tube Company, an Ohio corporation, providing for the sale of their stock in the Andrews & Hitchcock Iron Company to the Youngstown Sheet & Tube Company, a true copy of which contract is hereto attached, marked "Exhibit 1," and hereby made a part of this stipulation as if specifically written herein, together with a true copy of a certain written contract dated December 16, 1914, by and between the stockholders of the Mahoning Ore & Steel Company, which contract of December

16, 1914, was by reference made a part of said written contract of March 11, 1916.

4. On March 22nd, 1917, Louisa Andrews, the taxpayer's mother, died, leaving a last will and testament, which was duly admitted to probate, and under which the taxpayer received by bequest a 550/4000ths interest in any payments that might subsequently become due under the said contract, Exhibit 1.

5. The value of the said 550/4000ths interest so acquired by the taxpayer under her mother's will was fixed by the Commis-
78 sioner of Internal Revenue for the purposes of Federal estate tax imposed upon the estate of Louisa Andrews at $277,164.50.

6. The value on March 1, 1913, of the 350 shares of stock of the Andrews & Hitchcock Iron Company owned by the taxpayer and sold by her under said contract, Exhibit 1, was in excess of the sum of $234,703.70 and exceeded the cost of said shares to her.

7. Since the sale of said 350 shares under the contract, Exhibit 1, the taxpayer has received the following sums on account of the purchase price of said stock down to and including the year 1919:

1916	$192,500.00	(Taxpayer's share of the $2,200,000 paid in cash under said contract, Exhibit 1.)
1917	13,860.00	
1918	15,750.00	
1919	12,593.70	

8. The total of the sums received by the taxpayer as a result of the sale of said 350 shares of stock owned by her under the contract, Exhibit 1, down to and including the year 1919, was less than the value on March 1, 1913, of the 350 shares of stock sold.

9. Since the death of her mother, Louisa Andrews, on March 22, 1917, the taxpayer, down to and including the year 1919, has
79 received the following sums under said contract, Exhibit 1, on account of the 550/4000ths interest in the future payments under said contract acquired by her under her mother's will:

1917	Nothing.
1918	"
1919	$19,790.10

10. The total of the sums so received by the taxpayer since her mother's death, by virtue of the 550/4000ths interest in the future payments under said contract Exhibit 1, acquired by the taxpayer under her mother's will, was less than the value of the said 550/4000ths interest fixed by the Commissioner of Internal Revenue for the purposes of the Federal estate tax upon the estate of Louisa Andrews, and less than the value of said interest at the date it was acquired by inheritance from her mother.

11. The taxpayer, between March 1, 1913, and December 31, 1919, kept no books, and her returns for Federal income-tax purposes for the years 1916 to 1919, inclusive, were made upon the basis of cash receipts and disbursements.

12. A difference of opinion existed between engineers and experts employed by the Mahoning Ore & Steel Company on the one hand,

and by the Commissioner of Internal Revenue on the other,
80 both qualified by education and training in the iron mining industry, as to the estimated annual production of said mine and its life as of March 11, 1916.

13. Engineers employed by the commissioner, qualified by education and training in the iron mining industry to give such opinions, estimated that at the date of the contract of March 11, 1916 (Exhibit 1 attached hereto) that the ore reserves of the Mahoning Ore & Steel Company were 82,858,535 tons; that the average annual future production from said mine would be 1,841,300 tons; and that the life of the mine was 45 years from March 11, 1916.

14. The estimate mentioned above and adopted by the commissioner in this case was based upon data obtained from the Mahoning Ore & Steel Company and the estimate furnished by that company's engineers, given in a proceeding to fix the depletion rate for the Mahoning Ore & Steel Company. It was based upon the content of recoverable ore in only approximately 620 acres out of the entire property leased by the company.

15. Since fixing the deficiency in this case, the Commissioner of Internal Revenue in a proceeding in which the depletion rate for the Mahoning Ore & Steel Company was changed, based upon data furnished by the company and the opinions of duly qualified
81 engineers and experts employed by him, found that the life of said mine was forty years from March 1, 1913, and that the estimated ore reserves of said mine on March 1, 1913, was 88,561,533 tons. The tonnage mined from said Mahoning mine from the 1st day of March, 1913, to the 11th day of March, 1916, was 5,039,655 tons.

16. The actual ore mined annually in tons for the Mahoning Ore & Steel Company between 1913 and 1926, inclusive, was as follows:

1913	1,515,428	1920	1,720,537
1914	1,212,287	1921	803,020
1915	2,311,940	1922	1,011,204
1916	2,215,788	1923	3,029,865
1917	2,525,144	1924	1,717,092
1918	2,019,481	1925	1,690,138
1919	1,217,167	1926	1,813,811

17. Assuming that the said Mahoning mine had ore reserves on March 11, 1916, of 82,858,535 tons, and further assuming that all said ore was mined, and 12%, thereof, namely, 9,942,664.2 tons, were delivered to Youngstown Sheet & Tube Company, the total
82 amount which would be received under the provisions of the contract of March 11, 1916, Exhibit 1, by all the vendors of said stock and their successors in interest would be the sum of $5,965,814.52, at the rate of 60¢ per ton.

18. The present worth of the sum of $5,965,814.52 based upon the assumption that the amount was to be received in equal annual installments during 45 years, discounted at 6%, with provision for a sinking fund at 4%, was on March 11, 1916, $1,942,111.46.

(Signatures.)

WASHINGTON, D. C., *January 17, 1928.*

Exhibit 1 to agreed statement of facts

This agreement made and entered into at Youngstown, Ohio, this 11th day of March, A. D. 1916, by and between Louisa Andrews, Julia Andrews Bruce, Edith Andrews Logan, W. J. Hitchcock, Frank Hitchcock, H. W. Heedy, and the estate of U. A. Andrews, parties of the first part, hereinafter called the stockholders, and the Youngstown Sheet & Tube Company (an Ohio corporation), party of the second part, hereinafter called the Youngstown Company:

Witnesses that whereas said stockholders are the owners of all the capital stock of the Andrews & Hitchcock Iron Company (an
83 Ohio corporation), and the Youngstown Company is desirous of purchasing all of said stock for the benefit of itself and others, as hereinafter designated, upon the terms and conditions following:

Now, therefore, it is agreed by and between said parties as follows, to wit:

First. The stockholders, for themselves and their respective heirs, representatives, and assigns, agree with the Youngstown Company, for itself, its successors, and assigns, that they will sell, assign, transfer, and set over to the Youngstown Company and the others hereinafter designated all of said capital stock of said the Andrews & Hitchcock Iron Company, and the Youngstown Company agrees that it will purchase said stock for itself and said others hereinafter designated and pay therefor to the Dollar Savings & Trust Company, of Youngstown, Ohio, for the benefit of said stockholders, the sum of one thousand dollars ($1,000.00) cash in hand upon the execution and delivery of this agreement, receipt whereof is hereby acknowledged; the further sum of two million one hundred ninety-nine thousand dollars ($2,199,000.00) on the 11th day of April, A. D. 1916; and the further sum in amount and manner to be determined as provided in paragraph 4 hereof.

Second. Said stockholders further agree that forthwith upon the execution and delivery of this contract they will deliver or
84 cause to be delivered to said the Dollar Savings & Trust Company all of said capital stock, properly assigned, and that they will cause said the Dollar Savings & Trust Company to deliver the same to said the Youngstown Company and others upon the payment of said sum of two million one hundred ninety-nine thousand dollars ($2,199,000.00) to said the Dollar Savings & Trust Company on said 11th day of April, as above provided, it being the intention of the parties that the title to said stock shall pass to and vest in the Youngstown Company and said others upon the making of said payment on April 11th, 1916, and that delivery of said stock and the making of said payment shall be simultaneous.

Third. It is understood that the capital stock of said the Andrews & Hitchcock Iron Company is four hundred thousand dollars ($400,000.00), divided into four thousand (4,000) shares of the par value

of one hundred dollars ($100.00) each, and that the same is owned by said stockholders in the following several proportions:

Louisa Andrews	1,180	shares.
Julia Andrews Bruce	350	"
Edith Andrews Logan	250	"
W. J. Hitchcock	1,000	"
Frank Hitchcock	1,000	"
H. W. Heedy	100	"
Estate of U. A. Andrews	120	"

It is further agreed that said the Dollar Savings & Trust
85 Company shall deliver said stock to said the Youngstown Company and others as follows:

To the Youngstown Company	3,993	shares.
To James A. Campbell	One	"
To Richard Garlick	One	"
To C. S. Robinson	One	"
To William E. Manning	One	"
To L. J. Campbell	One	"
To C. D. Hine	One	"
To E. L. Ford	One	"

Fourth: It is understood that said the Andrews & Hitchcock Iron Company is the owner of twelve per cent, or three hundred sixty (360) shares of the capital stock of the Mahoning Ore & Steel Company, a corporation of the State of Pennsylvania, having a capital stock of three hundred thousand dollars ($300,000.00), divided into three thousand (3,000) shares of the par value of one hundred ($100) each, which said Ore & Steel Company is the owner of certain valuable mines for the production of iron ore, and that the said the Andrews & Hitchcock Iron Company, by an agreement in writing in quintuplicate, bearing date of December 16th, 1914, is entitled to take each year a full quota of each grade of ore to be produced by said Ore & Steel Company in proportion to the amount of stock owned by or represented for it, as provided for in said agreement, a copy of which is hereto attached, and marked "Exhibit A" for the purpose of making the same a part thereof; and for the purpose of fixing the balance of the purchase price to be paid
86 by the Youngstown Company, it is therefore further agreed between said parties as follows, to wit:

That the Youngstown Company shall, and will each year hereafter, take or cause to be taken the full quota of ore to which the said the Andrews and Hitchcock Iron Company, its successors or assigns, may be entitled, under and by virtue of the terms of said written agreement of December 16th, 1914, and shall give the notice provided for in said agreement, and will pay or cause to be paid to said the Dollar Savings & Trust Company for the benefit of said stockholders, and as the balance of said purchase price, each year on or before thirty days after the close of navigation to the transportation of ore on the Great Lakes, the sum of sixty cents (60¢) per ton for each and every ton of twenty-two hundred forty (2,240)

pounds of iron ore so entitled to be taken for such year, and actually delivered by said Ore and Steel Company, it being understood that if any part of the quota for any year be left at the mine by election of the Youngstown Company, the Youngstown Company shall pay on account thereof to the stockholders in the same manner as though the same had been shipped from the mine, but shall not thereafter be required to pay any additional sum on account thereof.

Fifth: In order to secure the making of said deferred payment of said purchase price, as provided for in paragraph fourth, it is further agreed between the parties that said three hundred and sixty (360) shares of Ore & Steel Company stock shall be properly
87 assigned and deposited in the hands of said the Dollar Savings & Trust Company as collateral security therefor, and shall be held until all of the balance of said purchase price is fully determined and paid.

If at any time the Youngstown Company fails to pay punctually any installment of said purchase price as it falls due, and such default continues for the period of thirty days after written notice and demand therefor made by the stockholders, or any of them, then any of said stockholders, in addition to any other lawful remedy, may elect to take and keep as and for his own, his proportionate share of said Ore and Steel Company stock to which his pro rata holdings of the stock of said the Andrews & Hitchcock Iron Company, as herein set forth, may entitle him, and shall have the further additional right to recover any and all costs, expenses, damages, and attorney fees suffered or incurred by him in premises.

It is further understood and agreed that the Youngstown Company will pay all costs, charges, and expenses, including attorney fees and compensation of the Dollar Savings & Trust Company connected with the making of this contract, and the full and complete performance of the trust herein provided for, it being the intention of the parties that said stockholders shall receive said sum of sixty cents per ton for ore and all other sums herein made payable to them, free and clear from any costs or expense whatsoever incident to the making or carrying out of this agreement.

88 Sixth. All payments made by the Youngstown Company to said the Dollar Savings & Trust Company shall be by it forthwith distributed and paid over to the stockholders in shares proportionate to their stockholdings in said the Andrews & Hitchcock Iron Company, as above set forth in paragraph third hereof.

Seventh. The rights and liabilities of the parties hereto shall extend to and be binding upon their respective heirs, or successors, administrators, executors, and assigns.

In witness whereof, the parties have signed or caused their names to be signed to triplicate hereof the day and year first above written.

(Signatures.)

Exhibit A to agreement

AGREEMENT

(Executed in quintuplicate)

(Being Exhibit A referred to in the foregoing Exhibit 1.)

Made this 16th day of December, 1914, by and between the present stockholders of the Mahoning Ore & Steel Company, said company having a capital stock of $300,000.00, divided into three thousand (3,000) shares each of $100.00 par, issued and held as follows:

Name	Shares	Percentage
John A. Topping, trustee (representing Republic Iron & Steel Co.)	180	6%
Frank Hitchcock, trustee (representing the Andrews & Hitchcock Iron Co.)	360	12%
Leonard C. Hann	65	
D. R. Hanna	63	
A. M. Robbins	33	
Simon Perkins	65	
C. C. Bolton	43	
Samuel W. Folsom	10	
L. C. Hanna and D. R. Hanna	80	
M. Andrews (represented by L. C. Hanna and C. C. Bolton, trustees)	1	12%
D. G. Kerr (representing Carnegie Steel Company)	1	
Carnegie Steel Company	599	20%
W. H. Donner	1,498	
Effingham B. Morris	1	
Herbert F. Black (representing Cambria Steel Company)	1	50%
	3,000	100%

Whereas, by agreement bearing date 26th of April, 1897, between representatives of the National Tube Company, Andrews & Hitchcock Iron Company, Mahoning Valley Iron Company, Andrews Brothers Company, and Cambria Iron Company, it was agreed that the capital stock of the Mahoning Ore Company was held for the use of the said five manufacturers and consumers of ore, as follows:

National Tube Works Company	20%
Andrews & Hitchcock Iron Co.	12%
Mahoning Valley Iron Company	6%
Andrews Brothers Company	12%
Cambria Iron Company	50%

and it was provided that each of said manufacturers and consumers should be entitled to take its proportional part of the total output of ore mined per annum from the mines of said company at the cost of production and delivery as therein fixed and determined;

And whereas the Mahoning Ore & Steel Company was organized in pursuance of the provisions of said agreement and took over all leaseholds, property, and assets of the Mahoning Ore Company;

And whereas since the date of said agreement, there have been transfers of said capital stock of the Mahoning Ore & Steel Company and changes in the ownership thereof by and with the approval

of all the parties in interest, and it is desirable to restate the respective interests as they now stand and more clearly provide for disposal of the ore produced from the mine of the said Mahoning Ore & Steel Company;

Now, therefore, this agreement witnesseth that the entire capital stock of Mahoning Ore & Steel Company being now held as hereinbefore stated, each of the parties in interest hereby agrees that the base agreement bearing date of April 26th, 1897, be, and
91 hereby is, terminated, and that in lieu thereof the following terms and conditions shall hereafter govern the method whereby the iron ore produced from mines of said company shall be disposed of.

First. The tonnage of each grade to be produced annually shall be fixed by the board of directors on or before April 1st, in each year, and notice of the fixing of said tonnage shall be mailed promptly to each stockholder.

Second. Each of the interests, as hereinbefore set forth, shall be entitled to take a full quota of each grade to be produced, in proportion to the amount of stock owned by or represented for them, and within 15 days after receipt of notice referred to in preceding paragraph, shall notify in writing the president of said Mahoning Ore & Steel Company whether or not it elects to take the full quota to which it is entitled. Undesired tonnage, if any, shall be offered pro rata to the other stockholders, and such portion thereof not desired by them can be disposed of by the board of directors by reducing the originally fixed production to the extent of the unaccepted tonnage, or in any other manner the board of directors may agree upon.

Third. The price of ores shall be fixed each year by the board of directors and shall be at or about the cost of production, including all costs, transportation, delivery, handling, etc., to the lower Lake ports. Delivery elsewhere with corresponding modification in price,
92 may be arranged in special instances, subject to the approval by the board of directors.

Fourth. Formal contracts shall be entered into annually with the company covering the tonnage and grade of ore which each interest or representative shall have elected to take, in accordance with the provisions of this agreement, and as estimated cost price will be named in said contract, based on preceding section, subject to adjustment to actual cost at end of ore season.

In witness whereof this agreement has been executed by the parties hereto the day and year above written.

D. C. KERR,
For Carnegie Steel Company.
THE ANDREWS & HITCHCOCK COMPANY,
By FRANK HITCHCOCK, *Pt.*
W. H. DONNER,
E. B. MORRIS,
HERBERT F. BLACK,
Representing Cambria Steel Co.

L. C. HANNA,
C. C. BOLTON,
As Trustees.
JNO. A. TOPPING,
Trustee, Republic Iron & Steel Co.

There was then offered and received in evidence, as petitioner's Exhibit No. 1 a copy of the contract of sale between the stock-
93 holders of the Andrews & Hitchcock Iron Company, on the one part, and the Youngstown Sheet & Tube Company, on the second part, dated March 11, 1916, and which forms part of the agreed statement of facts as Exhibit 1 thereto and which is fully above set forth.

Thereupon, under the reservation to either party of the right to raise a question as to the materiality of any facts agreed upon, as set out in the agreed statement of facts hereinabove set forth, attorneys for petitioner entered objections to the 13th, 14th, 15th, and 18th paragraphs of said agreed statement of facts, as follows:

Objections to stipulation

"Mr. TOMPKINS. On behalf of Edith Andrews Logan, under the rights of objection raised to the stipulation, I object to the 13th paragraph of the stipulation, upon the ground that it is incompetent, irrelevant, and immaterial, and has no bearing on this proceeding; that the test here is not as to the value of the Mahoning mine, but as to whether the obligation of the Youngstown Sheet & Tube Company, under the contract of March 11, 1916, to make future payments, could be sold, whether a purchaser could be found so as to make it a closed transaction or not, and that, as matter of law, it would be error to value the contract and treat it as a closed transaction based upon the estimates made by the engineers merely as to the life of the mine. The test here is whether the obligation of the Youngs-
94 town Sheet & Tube Company to pay 60¢ per ton for the ore under this contract could be sold and disposed of, whether there was any purchaser that could be found in the market in 1916 that would be ready and willing to pay cash or the equivalent of cash for that obligation. It is to preserve our legal rights that I make that objection.

* * * * * * *

"The MEMBER. As I understand it, there is no objection raised to the actual fact.

"Mr. TOMPKINS. Yes, sir; that is right.

"Mr. FORD. That is right.

"Mr. TOMPKINS. No; there is no question about that.

"The MEMBER. The record will simply show your objection to it. I do not see that it is necessary for me to rule upon it at the present time.

"Mr. TOMPKINS. If you rule later adversely to us, of course, you will save us an exception?

"The MEMBER. Yes; that is correct.

* * * * * * *

"Mr. MITCHELL. And the commissioner, in the event the objection is sustained, would also desire an exception.

"The MEMBER. That will be noted.

* * * * * * *

"Mr. TOMPKINS. May a similar objection be noted to this 14th paragraph? I suppose your honor will make a similar ruling.

"The MEMBER. Yes; that is correct.

95 "Mr. FORD (after reading paragraph 15 of the agreed statement of facts). A similar situation here arises, does it not?

"Mr. TOMPKINS. Yes.

"The MEMBER. A similar ruling.

* * * * * * *

"Mr. TOMPKINS. On behalf of the taxpayers we object to paragraph 18 of the proposed stipulation upon the ground that it is irrelevant and immaterial and has no bearing on the case, and that the contract of March 11, in evidence here, and the record as to actual tonnage show that this sum of $5,965,814.52 would not be received in equal annual installments over a period of 45 years.

"The MEMBER. I make the same ruling in this instance that I did in the other.

"Mr. TOMPKINS. The same ruling with reference to taking an exception?

"The MEMBER. Yes."

* * * * * * *

Said member later overruled said objection to the 13th, 14th, 15th, and 18th paragraphs of the agreed statement of facts, hereinabove fully set out, and duly noted exceptions on behalf of petitioner to said rulings.

Thereupon there was offered and received in evidence, as petitioner's Exhibit No. 2, a statement by the Commissioner of Internal Revenue attached to his notice of deficiency and identified by the symbols, IT:PA:1-VMW-104-60D, the material portions of which are as follows:

96 *Petitioner's Exhibit 2*

In re: Mrs. Edith Andrews Logan, 814 Stambaugh Building, Youngstown, Ohio

	Deficiency in tax	Overassessment
1915 (claim filed)		$18.60
1916 "		1,441.15
1917 "		491.73
1918 (waiver filed)	$994.05	
1919 "	14,277.92	
1920	6,776.66	
Totals	22,048.63	1,951.48

Your income-tax liability has been adjusted in accordance with the recommendation of the former committee on appeals and review as follows:

* * * * * * *

1916

* * * * * * *

From a reconsideration and audit of the information and data on file it is disclosed that no profit was realized in 1916 from the sale of the Andrews and Hitchcock Iron Company stock to the Youngstown Sheet and Tube Company, and, accordingly, the profit, as computed by the revenue agent who verified your return, has been excluded therefrom. A portion of the receipts from the ore shipments in subsequent years, however, is taxable, the basis of which is set
97 forth in the statement showing the tax adjustment for year 1917 and subsequent years, returns.

* * * * * * *

1917

* * * * * * *

Add to net income reported on original return:

Ore payments of $9,900.00 received, less return of capital of $3,222.45 ..... $6,677.55

You are advised that your taxable income from ore payments has been determined in accordance with the recommendation of the Committee on Appeals and Review. The following depletion schedule has been computed in accordance therewith:

DEPLETION SCHEDULE

Year	Receipts from ore	Tons paid for	Sustained	Depletion allowed	Claimed by omission
1917	$9,900.00	16,500	$3,222.45	$3,222.45	$9,900.00
1918	11,250.00	18,750	3,661.48	3,661.48	11,250.00
1919	28,785.60	47,976	9,478.14	9,478.14	28,785.60
1920	17,421.79	29,036	5,736.35	5,736.35	17,421.79

* * * * * * *

1918

* * * * * * *

Add to net income reported on original return:

Ore payments received from Youngstown Sheet and Tube Company, $11,250.00, less return of capital thereon of $3,661.48 ..... $7,588.52

* * * * * * *

98 The ore receipts from the Youngstown Sheet and Tube Company less the return of capital thereon have been included as income as shown herein under the statement showing the income and tax adjustment for 1917.

* * * * * * *

1919

* * * * * * *

Add to net income reported on original return:

Ore receipts of $28,785.60 received from Youngstown Sheet and Tube Company, less return of capital thereon of $9,478.14 ..... $19,307.46

* * * * * * *

The inclusion of the receipts of $28,785.60 in gross income, representing your share of the ore payments by the Youngstown Sheet and Tube Company with a deduction therefrom of $9,478.14, representing a return of capital, is based on the schedule in the statement following your tax adjustment for 1917.

* * * * * * *

1920

* * * * * * *

Add to net income reported on original return:

Ore receipts from the Youngstown Sheet and Tube Company of $17,421.79, less return of capital thereon of $5,736.35 ..... $11,685.44

* * * * * * *

99 The inclusion in gross income of the receipts from the Youngstown Sheet and Tube Company representing your share of the ore shipments with a deduction of $5,736.35, representing a return of capital, is based on the explanation of this transaction in

the statement following the adjustment of your net income and tax liability for 1917.

* * * * * * *

Thereupon, there was offered and received in evidence as petitioner's Exhibit No. 3, the recommendation of the committee on appeals and review of the Bureau of Internal Revenue dated February 4, 1924, as follows:

Petitioner's Exhibit 3

Recommendation No. —

Committee on Appeals and Review

In re: Appeal of Mrs. Julia Andrews Bruce, North Street, Greenwich, Connecticut

Years 1917, 1918, 1919, and 1920

FEBRUARY 4, 1924.

Mr. COMMISSIONER:

(For Deputy Commissioner, head Income Tax Unit.)

The committee has carefully considered the appeal of Julia Andrews Bruce, Greenwich, Connecticut, from the action of the
100 Income Tax Unit in proposing to assess additional taxes for the years 1917 to 1920, inclusive, predicated in part upon adjustments of net income hereinafter outlined.

Oral hearing was accorded the representative of appellant on January 16, 1924.

Appellant was the owner of 350 shares of a total of 4,000 shares of the capital stock of the Andrews and Hitchcock Iron Company. The latter company owned 360 shares, or 12%, of the entire outstanding capital stock of the Mahoning Ore and Steel Company.

Under an agreement bearing date of December 16, 1914, between the Mahoning Ore and Steel Company and its stockholders, the latter were entitled to take, at or about the cost of production, including all costs, transportation, delivery, handling, etc., to lower lake ports, a full quota of each grade of ore produced by the company in proportion to the amount of stock owned by or represented for them.

On March 11, 1916, the stockholders of the Andrews and Hitchcock Iron Company contracted to sell to the Youngstown Sheet and Tube Company all of their holdings in the former company for $2,200,000 cash, of which amount there was paid upon execution and delivery of the agreement $1,000, and $2,199,000 on April 11, 1916, and a further consideration set out in the contract as follows:

"That the Youngstown Company shall, and will each year hereafter, take or cause to be taken the full quota of ore to which
101 the said the Andrews and Hitchcock Iron Company, its successors or assigns, may be entitled, under and by virtue of the

terms of said written agreement of December 16th, 1914, and shall give the notice provided for in said agreement, and will pay or cause to be paid to the said the Dollar Savings & Trust Company for the benefit of said stockholders, and as the balance of said purchase price, each year on or before thirty days after the close of navigation to the transportation of ore on the Great Lakes, the sum of sixty cents (60¢) per ton for each and every ton of twenty-two hundred forty (2,240) pounds of iron ore so entitled to be taken for such year, and actually delivered by said ore and steel company, it being understood that if any part of the quota for any year be left at the mine by election of the Youngstown Company, the Youngstown Company shall pay on account thereof to the stockholders in the same manner as though the same had been shipped from the mine, but shall not thereafter be required to pay any additional sum on account thereof."

The contract sets forth that it is "the intention of the parties that the title to said stock shall pass to and vest in the Youngstown Company and others upon the making of said payment on April 11, 1916, and that delivery of said stock and the making of said payment shall be simultaneous." The contract further provides that the
102 360 shares of stock of the Mahoning Ore & Steel Company owned by the Andrews and Hitchcock Iron Company were to be properly assigned and deposited in the hands of the Dollar Savings and Trust Company as collateral security "until all of the balance of said purchase price is fully determined and paid," and that in the event of default in the payment of any installment continues for a period of 30 days after written notice and demand therefor by the vendors, or any of them, then any of said vendors, "in addition to any other lawful remedy, may elect to take and keep as and for his own his proportionate share of said Ore and Steel Company stock to which his pro rata holdings of stock of said the Andrews Hitchcock Iron Company may entitle him."

Upon the death of her mother, which occurred on March 22, 1917, appellant inherited a one-half interest in her mother's estate, including a 550/4000 interest in the contract of March 11, 1916. The value of this interest for the purpose of the Federal estate tax has been appraised at $277,164.50.

As deferred payments on the purchase price of her holdings in the Andrews and Hitchcock Iron Company there was paid to appellant under the terms of the contract heretofore quoted the following amounts:

1917	$13,869.00	1919	$32,383.80
1918	15,750.00	1920	19,599.53

The appellant reported none of the above receipts as income
103 on her tax returns, but rather treated them as a return of capital, on the theory that she was entitled to recover the March 1, 1913, value of the stock sold and the fair market value at the date of acquisition of the 550/4000 interest in the contract of March 11, 1916, acquired by inheritance before reporting any receipts as income for tax purposes.

The Income Tax Unit has determined the total ore reserves in the mines of the Mahoning Ore and Steel Company on April 1, 1916, to have been 82,858,535 tons, and the life of the mines as 45 years from that date. On the basis of an ownership of 12% of the capital stock of the Mahoning Ore and Steel Company, the unit reasons that the total tonnage of ore to be delivered to the Andrews and Hitchcock Iron Company will amount to 9,943,024.2 tons which, at the rate of $0.60 per ton, will yield payments amounting in the aggregate to $5,965,814.52 to the former stockholders. The present worth at April 1, 1916, of such payments, assuming that the same will be paid in equal annual installments, discounted at 6% with provision for a sinking fund at an equivalent rate compounded annually, the unit finds to be $2,049,018.65. As the appellant received a 350/4000 interest in the contract of March 11, 1916, as a part of the purchase price of her stock, the unit further finds that the present worth at April 1, 1916, of her expected receipts was $179,289.13. Therefore, the unit finds that this amount of $179,289.13 plus $192,500, cash (350/4000 x
$2,200,000) or $371,789.13, was the consideration appellant
104 received in 1916 for her stock, and as this selling price was more than the cost of such stock and less than the March 1, 1913, value thereof, the unit further finds in accordance with Treasury Decision 3206 that appellant realized no gain or loss from the sale of this stock in 1916.

Out of every $0.60 received by appellant as deferred payments during the years under consideration on her 350/4000 interest in the contract of March 11, 1916, the unit has held that 20.6 cents constitutes a return of capital, while 39.4 cents constitutes taxable income. The unit has accepted the value of $277,164.50 for the 550/4000 interest acquired by inheritance, as appraised for the purpose of the Federal State tax, and has held that out of every $0.60 received by appellant as deferred payments during the years under consideration on this 550/4000 interest, 20.86 cents constitutes a return of capital, while 39.14 cents constitutes taxable income.

The appellant contends that this sale of stock should be treated as a sale of personal property partly for cash and partly for a deferred consideration, and since the obligations represented by the deferred payments have no readily realizable market value the amounts received would be applied to reduce the "basis" of the property sold and be taxable only, if, when, and to the extent that they ultimately exceed the "basis."

In support of this contention, reference is made to article 46 of Regulations 62 and S. M. 1353 and O. D. 482 (2 C. B. 77). Should this contention be rejected, then the appellant presents as an alternative that property was exchanged for a contract "calling for
105 a series of annual payments, or, in other words, for an annuity contract, in which event the case would fall under article 47 of Regulations 62, which provides that the amounts received under an annuity contract in excess of the premium or price paid therefor is income for the year of its receipt."

It should be noted here that the Income Tax Unit and the appellant are in accord with respect to the cost of appellant of her 350 shares of capital stock of the Andrews and Hitchcock Iron Company sold in 1916 and the March 1, 1913, value thereof.

The issues presented to the committee for determination may therefore be briefly summarized as follows:

(1) Is the Income Tax Unit correct in holding that the sale of this stock was a complete transaction in 1916, notwithstanding the fact that the transaction involved deferred payments extending over an estimated period of 45 years; and

(2) If the unit's action with respect to the first issue is correct, how are the deferred payments, as and when received, to be treated for income-tax purposes?

Under the provisions of article 26, par. 171, Regulations 33, revised, it was mandatory upon appellant to render her return for the year 1916 on the basis of cash receipts and disbursements. Therefore, unless it can be shown that the obligations of the purchaser were
equivalent to cash, the transaction could not be regarded as
106 having been completed in 1916 and the appellant would be
entitled to treat the same as a sale of personal property on the installment plan, as outlined in article 42, Regulations 45 (1920 edition). See O. D. 715 (3 C.B. 107). On the other hand, if it can be demonstrated that the obligations of the purchaser were equivalent to cash, then the proper rule to be followed under such circumstances would appear to be that set forth in article 1664 (a), Regulations 45 (1920 edition), as amended by Treasury Decision 3206, and the case would fall within that provision of article 42, Regulations 45 (1920 edition) as amended, which states that "occasionally a fourth type of sale is met with, in which the buyer makes an initial payment of such a substantial nature (for example, a payment of more than 25%) that the sale, though involving deferred payments, is not one on the installment plan."

It is with difficulty that a rule may be laid down as to when property may be said to have a fair market value. Each case must stand upon its own merits and be judged in the light of its own peculiar facts.

It implies the existence of a public of possible buyers at a fair price. The adjective "fair" emphasizes the idea of fairness inherent in the conception of market value and excludes any possibility of a construction of the words "market value" with reference to a market in which, or to circumstances of sale under which, for any reason, a fair price could not be obtained.

Having in mind the principle above enunciated and review-
107 ing all of the facts peculiar to the instant case, the committee is clearly of the opinion that the 350/4000 interest in the contract of March 11, 1916, received by the appellant as a part consideration for her holdings in the Andrews and Hitchcock Iron Company had a determinable and assignable fair market value when received

by her in 1916, and that such interest ought to be regarded as equivalent to cash. The contract of December 16, 1914, between the Mahoning Ore and Steel Company and its stockholders was iron-bound, and in the absence of any specific provision in the contract relating to the period of time covered by it, it is a reasonable presumption that it applied to the total contents of the Steel Company's mines as and when produced. The contents of those mines can be and have been readily determined. Likewise was the contract of March 11, 1916, between the Youngstown Sheet and Tube Company and the former stockholders of the Andrews and Hitchcock Iron Company equally iron-bound and assured to the latter deferred payments equivalent to $0.60 per ton on 12% of the total ore reserves of the Steel Company's mines. The deferred payments were secured by the 360 shares of the capital stock of the Steel Company owned by the Andrews and Hitchcock Iron Company which had been placed in the hands of a trustee for that purpose, and under the terms of the contract by virtue of which these shares were deposited with the trustee, the stockholders were assured that in the event of default in any of the deferred installments by the purchaser of the stock they
108 would receive their pro rata shares of the ore produced by the Steel Company by exercising their option to take over the collateral security. There can be no doubt but what, under the circumstances, the interest of each stockholder could be converted into cash without any material loss. The initial cash payment was in excess of 25% of the total selling price. The committee is, therefore, of the opinion that the sale by appellant in 1916 of 35[illegible] shares of the capital stock of the Andrews and Hitchcock Company for cash and deferred payments constituted a closed and completed transaction of that year.

The committee is of the opinion that the unit's computation of the present worth at April 1, 1916, of the appellant's 350/4000 interest in the contract of March 11, 1916, should be revised to the extent of providing a sinking fund at 4% rather than 6% as used by the unit. The result of this revision will show a present worth of $169,934.73 in lieu of $179,289.13 as computed by the unit.

The question of the manner of treating the deferred payments, as and when received, for income-tax purposes, presents no serious difficulties. It is obvious that if in computing gain or loss upon the transaction when completed in 1916, the appellant is given the benefit of a market value for her interest in the contract, which is based upon the discounting of the gross deferred payments at the rate of 6%, then in reaching a conclusion as to how the deferred payments, when received, shall be treated for income-tax pur-
109 poses, the computation should merely be reversed and the deferred payments allocated to a return of capital in the same ratio as the total deferred payments bear to their discounted value and the balance of such deferred payments reported as income. Therefore, of every dollar received represented by the 350/4000 in-

terest, $0.32554 represents a return of capital and $0.67446 constitutes taxable income. Of every dollar received represented by the 550/4000 interest acquired by inheritance, $0.33099 represents a return of capital and $0.66901 constitutes taxable income.

Accordingly, it is recommended that the action of the Income Tax Unit be modified as herein indicated; and that the appeal be denied.

(Signed) COMMITTEE ON APPEALS AND REVIEW.

Approved:

(Signed) D. H. BLAIR,
Commissioner of Internal Revenue.

"Mr. FORD. I am not attempting to offer the closing letters in the other cases, because these are being offered for the purpose of showing the particular method of computation adopted in the department, and they are similar in so far as that is concerned.

* * * * * * * *

"Mr. FORD. As I understand it, all of the stipulations are received?

"The MEMBER. Yes; that is correct."

110 Thereupon the following testimony was heard:

FRANK HITCHCOCK, having been first duly sworn as a witness on behalf of petitioner, upon direct examination, testified as follows:

My name is Frank Hitchcock, and I live in Youngstown, Ohio. I was formerly a stockholder and officer of the Andrews & Hitchcock Iron Company, and immediately before March 11, 1916, was president of that company. I negotiated, on behalf of the stockholders of the Andrews & Hitchcock Iron Company, the contract of March 11, 1916, entered into between those stockholders and the Youngstown Sheet & Tube Company. Mr. Campbell negotiated the contract on behalf of the Youngstown Sheet & Tube Company. He was then president of the Youngstown Sheet & Tube Company. His father was there, and Richard Garlick, but it was Mr. Campbell who did the talking. There were some other directors with Mr. Campbell at the time. The Andrews & Hitchcock Iron Company owned 12 per cent of the stock of the Mahoning Ore & Steel Company.

"Q. Referring to this contract of March 11, 1916, and the provision that some $2,200,000 be paid in cash, I will ask you whether that consideration of $2,200,000 was in payment indirectly for certain of the assets of the Andrews and Hitchcock Iron Company.

"Mr. MITCHELL: Just a moment. I object to that as call-
111 ing for a conclusion and as not the best evidence. The contract itself shows what the payments were for and what they were made for.

* * * * * * *

"The MEMBER. The objection is overruled. * * * An exception will be noted.

* * * * * * *

"A. They were."

Those assets comprised some small properties in Michigan. Some of them have turned out to be pretty good since then, but at that time they were pretty poor, I thought. They also included blast furnaces in Ohio, coal lands in Pennsylvania, and moneys in the bank. At that time these represented practically all the assets they had, outside of the value of the Mahoning Ore & Steel Company stock. There was no discussion at all to the effect that the present cash payment represented the interest of the Andrews & Hitchcock Iron Company in the Mahoning Ore & Steel Company stock.

"Q. Why did you not bring up any discussion as to a present cash payment for that interest?

* * * * * * *

"A. Being a minority stockholder, I did not think it was—I mean the Andrews and Hitchcock Iron Company being a minority stockholder in the Mahoning Ore and Steel Company, I did not think there was any chance of getting a cash value for the property and did not bring it up, as to its worth. I mean cash value as to its worth.

112 "Q. Mr. Hitchcock, at that time, namely, March 11, 1916, did you know of any market where you could have obtained or did you know of any market where could be sold an interest of 12 per cent of the stock of the Mahoning Ore & Steel Company?—A. No; not at its value.

* * * * * * *

"Q. Mr. Hitchcock, in 1916 was there any price established by public sale or sales in the way of ordinary business of similar contracts to this contract of March 11, 1916, in which the fair market value of the contract at that time, at the time it was made, could be determined?

"Mr. MITCHELL. Objected to as calling for a conclusion of the witness.

"A. No.

"The MEMBER. Objection overruled * * * an exception noted.

"Q. Was there in 1916 any general market for contracts of this character and any established or current market price?—A. No.

"Mr. MITCHELL. The same objection.

"The MEMBER. The same ruling.

"Mr. MITCHELL. Exception."

Upon cross-examination FRANK HITCHCOCK testified as follows:

I was president of the Andrews & Hitchcock Iron Company
113 in 1916, before I sold out, and had been president since about January, 1900. My position in the iron industry made me familiar with the larger transactions that went on in that industry.

I don't remember the sale of the Chemung mine and I do not know where the Chemung mine is. I do not know anything about the sale of the Kosmerl mine and I do not know where that mine is. I do not know the Eva mine or the Ruth mine and I don't know any of those names just at present.

In 1916, and for a few years before that, I had my office at Youngstown, Ohio. My duties required me to go up on the Mesaba Iron Range. I was up there two or three times a year, maybe oftener. It would depend altogether on what was going on then. We got monthly reports all the time. I made short trips, in going over the property and other properties. The name Tener mine is familiar, but I don't remember at the present time just what the transaction was involving that mine. I don't know the sale prices of any mine at or around 1916. I know there were mines sold there, but I don't know about 1916, just exactly right there. When mines were sold I did not inquire into the circumstances nor familiarize myself with the transaction except in a general way. I am not aware of the fact that the United States Steel Corporation was buying mines during or around that time. They were interested in iron mines, in the Mahoning mine.

"Q. Did I understand you to say that you did not think
114 there was any chance of getting the cash value of the Mahoning property?—A. Yes; I said that. There was no chance of getting the cash value, on account of the minority holdings.

"Q. When you sold out did you feel that you had not obtained the cash value?—A. When we sold out? We did not get through this contract—we expected to get the cash value.

"Q. Do you mean by your answer that you did not think you could get the cash value; you did not think you could get a payment in cash, the entire payment in cash?—A. We did not get the entire payment in cash.

"Q. You do not mean to say that you were not getting a fair value for your property, did you?—A. No.

"Q. You meant that you were getting it over a considerable term of years?—A. Yes."

I think that the United States Steel Corporation has bought some iron ore properties which collectively are as big as the Mahoning mine. I would say that that company and other large companies of the same sort sometimes did buy large ore properties. The United States Steel Company bought most of the properties, and they were put together. They bought the Oliver Mining Company, which is still in business.

"Q. Well, I understood you to say that you did not know of any market where 12 per cent of the Mahoning Ore & Steel Company stock could be sold at its value.

* * * * * * *

"A. Not for its cash value.

115 "Q. Not for cash value; and you mean by that not for the full purchase price in cash?—A. In cash; yes.

"Q. But you are not prepared to say that there was no market existing in which a reasonable value could be obtained, partly in cash and partly over a period of years; you are not prepared to say there was not that sort of a market, are you?—A. I did not know of any."

JOHN B. PUTNAM having been first duly sworn as a witness on behalf of petitioner, upon direct examination testified as follows:

My name is John B. Putnam, and I reside at Cleveland, Ohio. I am connected with Pickands, Mather & Company, in Cleveland. They are a steel company, a partnership. They operate iron and ore mines, and have coal, pig iron, and vessel interests. They have approximately 35 iron-ore properties in their different companies. I am generally familiar to-day with iron-ore leases and contracts covering the taking of iron ore. I have looked over the contract marked petitioner's Exhibit #1, dated the 11th day of March, 1916, between certain stockholders of the Andrews and Hitchcock Iron Company and the Youngstown Sheet and Tube Company.

"Q. In 1916, was there any price established by public sales, or sales in the way of ordinary business of similar contracts, by which the fair market value of this contract of March 11, 1916, petitioner's Exhibit #1, at the time it was made, can be determined?

116 "Mr. MITCHELL. I object to all that as calling for a conclusion of the witness, whose qualification to answer has not yet been established.

"The MEMBER. The objection is overruled * * * exception noted.

"A. I know of no such market for such contract.

"Q. Was there in 1916 any general market for contracts of that character or any established or current market price?

"Mr. MITCHELL. Same objection.

"The MEMBER. Overruled.

"Mr. MITCHELL. Exception.

"A. Not that I know of.

"Q. In your opinion, could the vendors—that is, the sellers of this contract, petitioner's Exhibit # 1, in 1916, on any sale of this contract—have readily realized in cash or its equivalent its real value?

"Mr. MITCHELL. The same objection.

"The MEMBER. The objection is overruled; exception will be noted.

"A. I think not.

"Q. Why not? Give your reason.

"Mr. MITCHELL. The same objection.

"The MEMBER. The same ruling; an exception noted.

117 "A. The real value of that contract depends upon two things, in my judgment. It depends, first, upon the total

amount of iron ore that will be taken out and taken by the Youngstown Sheet & Tube Company, and, second, upon the rate at which they will take that ore. All of the properties owned by the Mahoning Ore & Steel Company have not been explored, and the tonnage is not definitely ascertained, so that you would have a considerable amount of uncertainty as to the total amount of tonnage which would be shipped under the contract, and which would measure the payment of 60 cents a ton.

"In addition to that, there is no minimum in the contract, and there is no control by the purchaser or seller of that contract over the amount that will be shipped each year.

"The amount of ore under this contract and the stockholders' agreement to take the ore, which is referred to in there, is left to the control of the board of directors of the Mahoning Ore & Steel Company. They would determine each year how much ore would be taken from the property and therefore how much these payments would be, and their determination each year would, of course, have to be dependent upon the conditions and needs for this particular kind of ore of the controlling stockholders of the company. Those conditions vary widely with the other sources of supply of ore which those stockholders have. The conditions of the steel business, how much the consumption of that ore was, and particularly of these ores here—the particular consumption of this particular ore
118 by those stockholders would, of course, depend upon the kind of pig iron and the kind of steel they wanted to make.

"I am not an expert in metallurgy or what these ores would be good for, but I have had enough contact with the ore business to know that particular ores are used for particular purposes, and if the controlling stockholders have a large use for this particular kind of ore, they would probably fix the production higher than if they had a relatively small use for this particular kind of ore. They might have other ore supplies, which would have to be taken into consideration.

"Of course, the iron and steel business is notoriously a business of feast and famine, as you call it; so you would have ups and downs.

"For example, the total production of the Lake Superior district in 1917, as I recall it, was about sixty-three million odd tons. In 1921 it dropped down below thirty million tons—twenty-three millions tons, I think it was. You have those fluctuations in the total ore shipped from that district, and naturally you have to expect probably relatively larger fluctuations in the production of any one mine, which would be affected not only by the general conditions but by the specific conditions with reference to that mine and that particular ore.

"I might also say in addition to that that I believe it is customary—indeed, it has been our experience—that iron-ore mines and leases and anything that is dependent for its value upon the
119 total volume of iron ore, the rate of production, and so forth, are not customarily sold for cash. There have been sales of

iron ore mines, but I am not familiar with any, except in a general way, but the most universal practice in the Lake Superior district is to transfer title or permit the development of an iron ore property through leases and contracts, which run over a period of years and vary their payments with the total volume of ore taken out from the mines and the annual rate of production. In my judgment, from the acquaintance I have had with it, that is the natural outgrowth of this kind of a situation, that the true value of those things can only be determined after the total ore reserves have been developed and shown and after you have been through the experience and determined what the actual production is going to be.

"Now, I do not mean by that that it has no value, and I do not mean by that that you can not arrive at some value for it; but so far as the cash sale value goes, customarily those contracts and interests in iron ore properties are not dealt in in that way."

Upon cross-examination, JOHN B. PUTNAM further testified:

"Q. You find that iron ore properties are ordinarily sold with the terms of payment closely related to the expected production; is that the idea?—A. No; they are customarily leased. You are referring now to a property owned in fee, where the owner wants it developed and the ore disposed of?

120 "Well, let us deal just with sales for the minute. When iron ore properties are sold, has it been your experience that payment ordinarily follows the expected rate of production and expected life? For instance, if the mine sold is expected to have a life of 20 years, will you ordinarily find that payments are spread over 20 years?—A. I do not know of any sales of iron ore properties, except a sale that I heard about generally, which Jones & Laughlin made to the Cleveland Cliffs Iron Company, of a small property on the Marquette Range. They sold that for cash a good many years ago, in connection with the sale of a lot of timber lands up there.

"In addition to that, however, we have two properties, I think it is—two small properties in the Menomonee Range, buying a minority interest in the fee. Generally, in those cases, the thing comes up through the properties being inactive. They are subject to leases which have small minimums, and they get into the hands of some estates. They come to us with the lease, and they ask us to buy the fee.

"Those are the only cases I know of where the fees of properties have been sold for cash."

I never heard of the United States Steel Company buying fees of ore properties for cash recently. If you include in a sale a situation of this kind—the Biwabik Mining Company, you might say, bought the fee of one of the forties of their mine, and they did it in this way: They took and bought it, and they gave back a contract which obligated them to pay so much a ton on every ton of ore they

121 took out. Now, if you call that a sale, I have known of that one. I do not know as I have known of any others outside of that one.

I never heard of the sale of the Eva or Ruth mine to the United States Steel Company, nor did I ever hear of the Eva or Ruth mine. I never heard of the Kosmerl mine. I have heard of the purchase of iron ore property by Henry Ford or his associates. I understand he bought the Imperial mine in fee.

"Q. Well, is it not true that there is a possible market for iron ore properties in the Mesaba Range to such interests as the United States Steel and Henry Ford, or similar interests?

"Mr. TOMPKINS. Just a moment. I object to that, on the ground that it is incompetent, irrelevant, and immaterial to the issue in this case. It is not as to whether there is any market for an iron ore mine in the Mesaba Range but as to whether this contract of March 11, 1916, had any value or whether there was any market for the deferred obligations under the contract.

"The MEMBER. The objection is overruled.

"Mr. TOMPKINS. Exception.

* * * * * * * * *

"A. In my judgment there is no market for a cash sale for any large or really valuable iron ore mine. Now, that sale of the Imperial mine to Henry Ford—there was an old mine, which
122 three or four different operators had tried to make go but had thrown it up. It was a poor quality of ore, poorly developed, and poorly situated, and, as you know, Mr. Ford has found it impossible himself, with his efficient methods, to make it go. I do not think that would be a precedent for any other purchasers, and, as a matter of fact, Mr. Ford has now taken another property up there which I understand he has christened the Blueberry. He has taken that by lease. I think if the Imperial mine had been a really valuable mine, which the fee owners considered had a real value, they would never have gotten together on a cash price."

I have heard of the Leetonia mine. I never heard of that mine being sold. I heard indirectly one time that Jones & Laughlin had bought the stock of that company, as I recall it, or they had acquired all the stock or all the interest in the mine or lease in some form through acquiring either the stock of the mining company that held the lease or the stock of one of those furnace companies down there that had the lease. It was a complicated thing, and I do not remember the details of it, but I am quite sure it was not a sale of the mine. It is not my understanding that they went into the transaction without owning the mine and came out of it owning the mine. I think they just owned the lease. I do not think there is any question but what the Mahoning mine could be sold; I do not think there is any question but what it could be sold for cash or for cash payments over a period of years. What I have in mind is
123 this, if I can make myself clear; I do not believe a seller not under coercion of some kind would ever part with his interest in the Mahoning mine for a cash consideration which would be as low as a buyer would pay for it, and the proof of the fact that that does

not exist is that normally in that district these interests are transferred under these, you might call them, installment contracts, although they are not installment, because the total amount is left open and indefinite.

They are ordinarily sold with payments spread over the term of years, or a substantial part of the payments, and with the total amount left indefinite and conditional upon the amount of ore extracted and the rate of payment is conditional upon the rate of extraction. I think undoubtedly there are some developed properties where the total amount of ore is pretty definitely known.

I would say Pickands, Mather & Company operate about thirty-five mines. In my connection with that company I have something indirectly to do with Federal tax matters, but that is not my specialty. In my connection with Federal tax matters I have found it necessary to fix the cash market value as of March 1, 1913, for those mines. We have to do so on every property and on every lease that we owned on March 1, 1913.

I am 35 years of age. There is no question but what, if you have to fix a value, in my judgment, you can value any of these; you can value any contract; you can value any mine lease; but the result of our efforts to value our mining leases for depletion on
124 March 1, 1913, has been demonstrated in a great many cases. We have come down here and we have set up a certain value, and the department has discounted it, and finally gotten down to a figure that we could persuade them to take.

Now, in many cases which I could name to you it has turned out that all of the tonnage has not been valued; all of the value has not been given. We have actually shipped out of those mines a good deal more in certain cases already; and in more numerous cases we have developed more ore and now have in sight tonnages, which, when taken with the production we have shipped since 1913, will give a considerably larger tonnage than was valued at March 1, 1913. That does not mean, of course, that the properties did not have a value on March 1, 1913. It means that it had a considerably larger value—a considerably greater value—than was granted by the department, but we just had to take these lower values because of this kind of a market situation that you have that results in these leases.

I am familiar with the Mahoning property in a general way. I have been there and I know what the holdings are, just in a general way. I am not an engineer. I just know, in a general way, that out of about one thousand and odd acres of land a certain part of it is generally explored and a certain part of it is not.

125 J. C. AGNEW, having been first duly sworn as a witness on behalf of petitioner, upon direct examination testified as follows:

My full name is J. C. Agnew, and I live in East Aurora, New York. I am a mining engineer. I have been connected with the Mahoning Ore & Steel Company, and first entered their employ in 1904 as an

engineer. I was connected with that company until about April 1, 1923. About 1912 I was made general superintendent of the Mahoning Ore & Steel Company. On approximately January 1, 1919, I was made assistant to the president of the Midvale Steel & Ordnance Company and also a director of the Mahoning Ore & Steel Company.

The Midvale Steel & Ordnance Company acquired a half interest in the Mahoning Ore & Steel Company through its acquisition of the Cambria Steel Company; I think that was about 1915 or 1916.

The Midvale Steel & Ordnance Company was a combination of various companies, of which one was the Cambria Steel Company. The mine of the Mahoning Ore & Steel Company is located near Hibbing, in St. Louis County, Minnesota, on the Mesaba Range. I was resident at the mine until the 1st of January, 1919, or the later part of 1918.

In 1916 approximately one thousand acres of mineral property was owned by the Mahoning Ore & Steel Company. At that date about six forties (six 40-acre sections), approximately 240
126 acres, were under operation or had ore taken from them. As to the remaining properties, some had been explored in whole or in part. The entire property never had been explored. I would say that in addition to that portion that was in operation about one-third had been either pretty well explored, fairly explored, or you could see some evidence of tonnage around the edges, but not sufficient to determine the tonnage. In addition to those six forties that I have spoken of, I would say that there was probably another 60 or 80 acres that was quite thoroughly explored. Of that thousand, between 400 and 500 acres had either been totally or practically unexplored.

The Mahoning Ore & Steel Company did not own the fee of that property; they had a 99-year lease. From my familiarity with that property and my employment with the company I am able to state concerning the period up to 1909 or 1910 whether the company had any definite policy as to the amount of annual production. Up until that time the policy was one of conservation. At a production of 1,000,000 to 1,500,000 tons, and all the physical conditions that existed at the Mahoning mine, a very reasonable cost of production could be obtained. Also at about 1,000,000 or 1,500,000 tons, their royalty at 1,500,000 had reached its minimum of 12½ cents.

I am familiar with the State tax situation prior and subsequent to 1909 or 1910. About 1906 or 1907 taxes were very reasonable on the Mesaba, and commencing about 1907 they commenced to rise
127 very rapidly. Take this Mahoning Ore & Steel Company. The taxes had risen from about $40,000 in 1906 to about $244,000 in 1912, and to about $482,000 in 1916.

This policy of conservation, existing prior to about 1909 or 1910, underwent a change. That change took place about 1911, as I remember, occasioned by two things: First, the fact that the presidency of the Cambria Steel Company passed into the hands of Mr. Donner.

The Cambria Steel Company was a 50 per cent. owner in the Mahoning ore industry, and it was determined that more of this ore should be used at the Cambria plant at Johnstown, Pennsylvania, so that a plan was laid out for increased stripping and general equipment of the property so that this increase requirement could be met. This increased stripping took place about 1911, 1912, and 1913.

The plan was to put the mine in position to produce 3,000,000 tons a year. It was put in that position. I might say that about that time a contract was made between the Cambria Steel Company and the Pennsylvania Steel Company by which the Pennsylvania Steel Company had the right to take from the Cambria Steel Company ore from this mine to the extent of a portion of their requirements at Steelton, with a maximum requirement on the part of the Pennsylvania Steel Company, as I recollect it, of a half million tons. Mr. Donner also was president of the Pennsylvania Steel Company.

From my familiarity with the Mahoning Ore & Steel Company property and the business and physical conditions surrounding
128 it, at about March 11, 1916, I could not estimate with reasonable certainty the expected future production of that mine by years, annually.

That mine was the property of the various shareholdings, interests that, I believe, had been mentioned here, all of whom were consumers of the ore. The production of the property was determined from year to year, based on their needs, and their needs fluctuated for any number of reasons—business conditions, changes in their own practices, rearrangements of their own ore affairs, so it was very difficult to predicate any production. Our position as operators of the mine was at all times to be ready to meet their requirements.

In my opinion, general business conditions of the steel company had an effect on the annual production of the Mahoning mine. In times of depression it would be reflected in the production from the mine. The production of the mine would fall. In times when business was good, the production would be up. Of course, during the war those things were restricted more or less by distribution.

The effect of the European war, as I could foresee it, at about March 11, 1916, of course caused an upward tendency on the annual production of the Mahoning mine, but I think it was in 1917 or 1918 that the Railroad Administration stepped in, and we were limited. Our people wanted something over 3,000,000 tons, but our tonnage was reduced, in my opinion, to about 2,500,000 tons. The production in 1921 is typical of an extreme fluctuation—303,000 tons.

129 In March of 1916 you could not tell with reasonable accuracy the total content of ore in all of Mahoning Company's ore properties. That had something to do with the extent of the exploration. There were between four or five hundred acres of property on which the exploration was either not made or else the exploration was not sufficiently clear to give any estimate.

"Q. Well, as to the part of the property explored, do you think that could be determined with reasonable accuracy as to the amount of tonnage?—A. That is about three hundred acres out of the entire thousand.

* * * * * * *

"Q. Mr. Agnew, you have seen this contract of March 11, 1916, petitioner's Exhibit No. 1 [handing same to the witness]?—A. Yes.

"Q. In 1916 was there any price established by public sales or sales in the way of ordinary business of similar contracts by which the fair market value of that contract at the time it was made could be determined?—A. No.

"Mr. MITCHELL. I object to that as calling for a conclusion.

* * * * * * *

"The MEMBER. The objection is overruled * * * an exception is noted.

* * * * * * *

"Q. Was there in 1916 any general market for contracts of that character and any published or current market price for the same?—A. Not to my knowledge.

130 "Mr. MITCHELL. The same objection.

"The MEMBER. The same ruling * * * an exception will be noted.

* * * * * * *

"Q. In your opinion, could the vendors or the sellers under that contract or any sale of the contract have realized in 1916 in cash or its equivalent its real value?

"Mr. MITCHELL. The same objection.

"The MEMBER. The same ruling.

"A. No; I do not think so.

"Mr. MITCHELL. Exception."

Upon cross-examination, J. C. AGNEW further testified:

Attorney for respondent handed the witness a map (respondent's Exhibit A), with reference to which the witness testified as follows: This map shows the location of the Mahoning property. The main property to which I referred is there in those eight forties [indicating on map]. Now, there is a 60-acre tract right here [indicating on map]. Then there are two in here [indicating on map]. Now, there are three forties in section 19, right next to the Itasca County line. There are two forties near the St. Paul line, again in Itasca County. Then there is one other isolated 40-acre piece.

(Said map was then offered and received in evidence and
131 marked "Respondent's Exhibit A," a true and correct copy of which is attached hereto.)

(The witness then, upon request of attorney for respondent, marked on said map (Exhibit A) the lands of the Mahoning Ore & Steel Company in 1916, and stated at the same time that there are three forties in Itasca County that are not marked on it.

(The attorney for respondent also handed to witness a second map (respondent's Exhibit B), prepared from descriptions of the Minnesota authorities, with respect to which, witness testified as follows:)

This map (Exhibit B) shows the location of a portion of the principal ore lands of our company in 1916. They are the principal ones now. The portion set out on this map includes the part which was being actively operated in 1916.

(The map was then offered and received in evidence as "respondent's Exhibit B," a true and correct copy of which is attached hereto.

(The witness continued to testify as follows:)

I am not familiar with the Federal income and profits tax matters in which the company was involved while I was general superintendent. I am familiar with the tax situation between the company and the State of Minnesota. The State of Minnesota found an ore content only in the land set out on respondent's Exhibit B. It did not value on an ore content basis any of the company's lands other than the land set out on Exhibit B.

Both the Minnesota Tax Commission and the Federal Gov-
132 ernment arrived at their knowledge of this property from explorations made by the company itself. Neither the Minnesota Tax Commission nor the Federal Government ever did any drilling or exploration on this property. The tax commission got data * * * I can not speak so well for the Federal Government * * * from all of the companies which in any way had worked around this property, so that they had more information than we, as a company, had, and with the information thus obtained, the Minnesota Tax Commission put a tonnage on these properties. They put a valuation on the properties. That does not mean, as I interpret it, that there was no tonnage there. It simply means that, whatever you did, you would simply be putting a valuation on the ore; so why not just value it as mineral and, which the Minnesota Tax Commission had a perfect right to do. They could value your property either on the basis of your tonnage or they could simply value it as land. The Minnesota commission did not attempt to find any tonnage on the land not shown on Exhibit B. That also applied to the United States, i. e., the Federal Government only found tonnage on the lands shown on Exhibit B.

When I said a little while ago that in 1916 one could not tell with reasonable accuracy the tonnage content of ore, my answer applied to the entire holdings. I do not think that in 1916 the total content of ore in the lands disclosed by Exhibit B could be estimated with reasonable accuracy. Of the lands shown by Exhibit B, I would pick
133 lots 2, 3, and 4 in section 1, lots 1, 2, and 3 in section 2, the northwest quarter of the southeast quarter of section 2, the north half of the southwest quarter of the southeast quarter of section 2, as being the only lands, in my opinion, in which the ore contents could be determined with reasonable accuracy. Those lands

include all of the lands in sections 1 and 2, except the northeast quarter of the northeast quarter of section 1 and the northwest quarter of the northwest quarter of section 2. I want to qualify that statement, however. There are in the area which I outlined as fully explored certain areas which are not fully explored, but they are within the operating area. My statements apply only to the portion of the section marked in black on Exhibit B.

Now, as to the land shown by Exhibit B, where I said the ore content could not be ascertained with reasonable accuracy, that situation existed because there was not sufficient exploration. There were really three sorts of exploration that had been done there. The first was the old work, which was originally done back in 1893 or 1894 or 1895, consisting of test pits, and that touched the ore and was the basis on which this property was selected originally. Then as time went on the properties were put in operation adjoining this area in sections 3 and 10, so that you could go there and see, standing out on the line. There were, I think, something like 15 or 20 drill holes put down in this property subsequent to that.

"Q. You mean by 'this property', the company's holdings in sections 3 and 10?—A. 3 and 10.

134 "Q. 15 to 20 drillings?—A. That is my recollection."

The adjoining land was being mined, or had been mined in 1916, so that you could see something of the ore that lay on these properties. You could see it along the boundary line.

"Q. Well, take the two 40-acre parcels in sections 1 and 2, which you say were not susceptible of an accurate determination. Is it not true that the company's own workings adjoined both of those parcels?—A. Yes, sir; it did."

We had something like 15 or 20 drill holes on each of those two 40-acre parcels. Our company had an open pit in the six 40-acre parcels lying along the north line of sections 1 and 2.

The operation of our company's mine as it existed in 1916 was what is commonly known as stripping. The ore was covered by a glacial drift, and this drift was taken off and removed by steam shovels, and taken out and dumped. Then the iron ore was loaded by steam shovel right into the railroad car for transportation. Everything was standard gauge. I do not know whether that is enough of a picture of it. We had an open pit something like a mile and a half long, and in some places the width was approximately 1,300 feet. The Mahoning Ore & Steel Company's property happened to be a portion of one of the biggest ore deposits of the Mesaba Range.

Adjoining those eight forties, the United States Steel Company was conducting an operation, known as the Hull Rust mine. To the east of it, there is the Sellers mine, operated by the

135 United States Steel Corporation, and if you want to trace out that pit you will be going beyond the realms of my knowl-

edge. I had nothing to do with their operations. I am trying to talk to you as an operator on the Mahoning Ore & Steel Company's property, and when we reached that point we were done. That is the limit. If you include the property operated by the United States Steel Company, you can conceive of an opening standing where we are now, and looking off there for a distance of pretty nearly two miles, with very irregular sides, and probably a portion of it is three-quarters of a mile wide. Throughout that area there are stripping operations going on, taking out the overburden, and then there are shovels and locomotives and railroads and all of the activities that go to making up the mining of ore, drilling, and blasting. It is really quite a sight.

Of the holdings of my company as shown on Exhibit B, I made an estimate of the eight forties that I described and I have given my best opinion as to what was in the balance of it. When I speak of an estimate of a property like this, on which I was operating, let us understand each other clearly—I was making an estimate on which I had to perform. The ore not only had to be there, but it had to be there in quantity and in the grade that I said it would be there, and I had to produce it every year, as I said I would. That is what I mean by an estimate. Now, you can take this other property and you can do as the tax commission did; you can take all the area
136 around it and say this forty next to that produced so many tons of ore, and therefore it is reasonable to expect that this one would, and you can get a figure on it. You do not suppose that I tramped over all of that property for years without making my own guess as to how much tonnage it would produce. Of course I did, and, of course, I looked at every one of those forties. I knew them like I know a book. I made a guess of what was there, but it was a guess. In reporting to the stockholders, I would definitely advise them that as to eight quarters, I had given a fairly accurate estimate, and as to the others, I would advise them that it was merely a guess, because it might be my opinion, and Mr. Bill Jones, another engineer, might come up and say, "Agnew, I don't agree with you; it might be something else," and I could not refute it.

Before I would allow my opinions to be published, I would distinguish between my estimate and my guess. If I allowed my opinions to be published to the commissioner, I would distinguish in the same way.

(Upon request of attorney for respondent, a document, marked "Respondent's Exhibit C for identification," was then handed to the witness, who testified with reference thereto as follows:)

The paper marked for identification as "Respondent's Exhibit C" is my own affidavit. I signed that and swore to it. That affidavit sets out my opinion of the ore content on this land that we have been talking about.

(Said respondent's Exhibit C for identification was then offered and received in evidence as respondent's Exhibit C, which is as follows:)

137 *Respondent's Exhibit C*

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

J. C. AGNEW, being duly sworn, deposes and says that he resides in Ardmore, Montgomery County, Pennsylvania. That he is a mining engineer and is familiar with the development, exploration, and operation of the properties of Mahoning Ore & Steel Company, located in St. Louis and Itasca Counties, Minnesota, operated by said company under lease from Grant Iron Mining Company.

That deponent made estimates from time to time of the amount of stripping required to be done upon said properties, obtaining the information upon which such estimates were based from explorations and drillings made thereon. That from the estimates so made it appears that on March 1, 1913, on tract 1 (lots 1, 2, 3, and 4 of section 1, and lots 1, 2, 3, and 4 of section 2, of township 57, range 21), the stripping to be done aggregated 11,580,000 cubic yards. From the experience of deponent and the Mahoning Company in connection with the stripping of said property, deponent avers that an average cost of 22.4¢ per cubic yard is a fair estimate of the cost of stripping said property, making a total cost of the stripping remaining to be done thereon of $2,591,920. That the cost of stripping done on said property prior to March 1, 1913, was $1,893,790.81, making the total cost of stripping said property $4,485,710.81. The tonnage estimated in said property as of March 1, 1913, is 64,756,588 tons, and
138 there was mined out prior to 1913, 16,581,357 tons, making a total of 81,337,925 tons. Averaging the total cost of stripping over said tonnage gives an average cost of stripping of 5.5¢ per ton.

As to tract 2 (NW. quarter of SE. quarter and N. half of SW. quarter of SE. quarter of section 2, township 57, range 21), the stripping to be done on March 1, 1913, aggregated 1,500,000 cubic yards. Assuming a cost of 22.4¢ per cubic yard makes a total stripping cost of $336,000 for tract 2, or distributed over all of the tonnage in the property, 9,450,891 tons, gives an average cost of stripping of 3.55¢ per ton.

As to tract 3 (being SE. quarter of SE. quarter of section 3 and NE. quarter of NE. quarter of section 10, township 57, range 21), the stripping to be done on March 1, 1913, aggregated 13,500,000 cubic yards (each cubic yard of taconite in such computation being treated as three cubic yards of stripping). At a cost of 22.4¢ per cubic yard the total cost of stripping will be $3,024,000, or distributed over the tonnage in the property, 7,533,969 tons, gives an average cost of stripping of 40.1¢ per ton.

As to tract 4 (being N. half of NW. quarter and SE. quarter of the NW. quarter and NW. quarter of SW. quarter), the stripping to be done aggregated on March 1, 1913, 15,200,000 cubic yards (each cubic yard of taconite in such computation being treated as three

cubic yards of stripping). At a cost of 22.4¢ per cubic yard the total stripping cost will be $3,404,800, or at the rate of 31.8¢ per ton on the 10,709,600 tons alloted to the property.

139 From the information at hand as of March 1, 1913, we would estimate that tract 1 could produce 2,300,000 tons for a period of 25 years and that the tonnage remaining in tract 1 at the end of this 25-year period would be mined out in 5 to 6 years. This prediction is based on operating the property in such a way as to permit of producing 2,300,000 tons over the longest period possible, which would be accomplished by cleaning up or "scramming" the ore lying on the rock as mining operations progress and not postponing this "scramming" until the last possible moment. As a matter of fact, this policy has been followed in the past, although to date the number of places where the ore has been bottomed are very few, comparatively speaking. In view of the extent of this property, there is no reason why such a policy can not be followed out, and in our judgment it should be.

(Sgd.) J. C. AGNEW.

Sworn to before me this 20th day of November, 1920.

[SEAL.] (Sgd.) GRACE M. WOODRUFF,
Notary Public.

(The witness (Mr. Agnew) then continued his testimony as follows:)

The map (respondent's Exhibit B) sets out tracts 1, 2, 3, and 4, referred to in my affidavit.

(The witness then marked the map (respondent's Exhibit B) to indicate the respective tracts, and continued as follows:)

140 From an examination of my affidavit, I find that I made estimates of all four tracts shown on Exhibit B, and did not distinguish my estimate in any way. I did not distinguish my opinion as to the four tracts as between estimates and guesses. I made no distinguishing marks at all in this affidavit. From an examination of this affidavit, Exhibit C, I find that I have also given opinions of probable life of the portion of the company's holdings that were being actively operated. This is set forth in the third paragraph on page 2 of the affidavit as follows:

"From the information at hand as of March 1, 1913, we would estimate that tract 1 could produce 2,300,000 tons for a period of 25 years and that the tonnage remaining in tract 1 at the end of this 25-year period would be mined out in five to six years."

There was more difficulty in estimating a probable life for tract 2, tract 3, and tract 4, than there was for tract 1. This is an estimate of what it would be reasonable to assume that this tract 1 produced over the period from March 1, 1913. Now, that does not mean that if the stockholders wanted three or four million tons it could have produced it. It is merely an estimate of what they could produce. This estimate was made for purposes of depletion of that property,

and was stated as from March 1 to May 8, 1921. I was asked to make this estimate by the president of the company, in order that the company might prepare its case for depletion. That is what this estimate is. It is one estimate of the propable life of tract 1.

141 (Attorney for respondent then handed the witness another map (respondent's Exhibit D), with reference to which the witness testified as follows:)

This is a map of tracts 1, 2, 3, and 4 that we have been talking about and surrounding country. It sets out generally the drill holes and the mining pits in that country and as to that area. It is dated January 1, 1913, and was prepared by the engineers of the company.

(Said map was then offered and received in evidence and marked "Respondent's Exhibit D," a true and correct copy of which is attached hereto. Witness then continued to testify:)

I do not know what the date means, whether that was the date of preparation or not. There have been made here additions to the date and legend. Whether that is the date on which the map was made, or whether it is the date on which the map was to be used, I am not sure. The date January 1, 1913, is on it, and it would be my best information that this map was prepared for use in valuing the properties as of January 1, 1913, and would show the condition as of January 1, 1913.

As to tract No. 3, I find that almost all of the west side adjoins an existing pit, and that half of the east side of that tract adjoins an open pit. As to tract No. 4, I find that a quarter of a mile on the east side and a quarter of a mile on the north side adjoins an open pit.

As to tract No. 2, I find that considerable portions of the boundary of that tract adjoin an open pit. Tract No. 2 was not thor-

142 oughly explored. There is not much question about the tonnage in that, and this is simply corroborative evidence. As to tract 3 and tract 4, it was on such data as mentioned that the Minnesota Tax Commission prepared their tonnage estimate on each portion. My affidavit is dated in 1921. Probably you did not have the record here.

We drilled some holes on these properties to see whether the tax commission's estimate was too high. Such holes as we did drill indicated that the tax commission's estimate was a conservative estimate, and we stopped there. My affidavit is based not only on the data indicated by the map but on later explorations, and those later explorations indicate that the estimate in my affidavit was correct.

In estimating the future production of the Mahoning mine as of 1916, I think the first factor is, as I have stated, the physical condition of the property. The property was able to produce 3,000,000 tons or more, so far as the property was concerned. Now, the other phase of the situation is the one that I went into a little earlier in my testimony, of the various requirements and demands of these stockholders from time to time, and that you can only judge from their plans and from what they proposed to do. The general demand

for iron ore in the United States would be an important factor, but you are dealing here with one of the cheapest ores that are produced on the range, and you always have the other phase of the situation, that your steel company is striving for cost, and they might use
143 that ore, because there is a saving even when times are hard. It is not so important when they are making money, so you have all those things to balance there. The general demand in this country for iron ore would be an important factor. Another important factor would be the condition of the industry in this country; i. e., whether times were prosperous or otherwise. It has been my experience that the demand for iron ore bears a fairly close relation to the general prosperity of the country.

I am familiar with a publication called "The Iron Ores of Lake Superior," put out by Crowell & Murray. They are always kind enough to send me one. I would regard the figures set out in that book for yearly shipments from the Mahoning mine as reasonably accurate.

(Thereupon counsel for respondent read into the record the statement of yearly shipments of ore as shown by the book The Iron Ores of Lake Superior for a period from 1900 up to and including 1912:)

1900	911,021 tons.	1907	1,564,332 tons.
1901	765,872 "	1908	611,592 "
1902	1,038,645 "	1909	1,561,893 "
1903	1,009,446 "	1910	1,515,723 "
1904	706,325 "	1911	1,011,945 "
1905	1,001,661 "	1912	1,518,643 "
1906	1,274,232 "		

144 These yearly shipments of ore would for all practical purposes be equivalent to the annual production, and the record just read corresponds substantially with my own record.

I do not think that the record just read, coupled with the record of production set out in the stipulation, indicates that the production of this mine is on a pretty even basis. If you will continue on there you will see that there has been an increase.

"Q. Yes; and don't you find that increase is a steady and somewhat slow increase?—A. Well, you have the figures there. I would say that there were some pretty substantial jumps there. I have not the figures in front of me."

We have in these records of production that there was a change in policy in this mine along about 1912, 1913, or 1914. The 1912 production is 1,518,000 tons. In 1913 it was 1,500,000. In 1914, the beginning of depression, it was 1,212,000. Then we jump up to 2,300,000, an increase of 1,000,000 tons. Leaving out the depression here, there is an increase of 800,000. Then we went along 2,300,000, 2,200,000, 2,500,000. Then you get your postwar period, 1,200,000, 1,700,000, and getting into 1921 we only had 303,000. From the standpoint of the production, 1921 was the worst year in the history of this company after we got into active production.

I would not say that the period from 1913 up to 1926, inclusive, could be considered as a representative period, taking the period as a whole. I would say that for two reasons. You have your
145 war years there of 1917 and 1918, and then you have your post-war years there, and that is evidence again, you see, by 1923, where you get to 3,000,000 tons. It is pretty hard, I think, to make a statement that any past ten years is necessarily indicative of what the next ten would be on this property, because you have all of those changing factors there. For instance, this property in 1923 changed hands again. The interest which the Midvale Steel & Ordnance Company acquired from the Cambria Steel Company passed in 1923 into the hands of the Bethlehem Steel Company.

I don't know the maximum capacity of that mine in 1916. Up to 1914 or 1915 I could have shipped six or seven million tons per year, if anybody could have hauled it away from there. We had a capacity for 3,000,000 tons during a year, but it was not contemplated that the company would produce 3,000,000 tons a year. The company's plan or program which resulted in the stripping of 1912 and 1913 was to have the property always ready to supply to its stockholders at least 3,000,000 tons per year. Now, in order to do that there were certain periods of war involved in the proposition that I do not know we need to go into here, but you had to have sufficient area and sufficient equipment so that in addition to producing this 3,000,000 tons of ore you had to produce 3,000,000 tons of the character of ore that your stockholders desired—roughly speaking, Bessemer and non-Bessemer, 3,000,000 tons a year is all that we planned to produce.

We did not actually produce 3,000,000 tons a year, but that
146 was the plan. Otherwise there would not be any need for that investment in stripping. I think we could have produced 3,000,000 tons in 1913, but I am not sure whether we could have made the grade or not, because our stripping program was not completed at that time. I do not think it was actually completed until 1914, as I remember it.

The actual production in 1914 was 1,212,000 tons. We have that discrepancy between actual production and this plan, because, if you will put your memory back to 1914, it was a pretty poor year in the iron and steel business and in business generally.

The next year there was a considerable demand for iron ore. You see we had reached 2,300,000, but we were still 700,000 short of 3,000,000 because the stockholders did not want it. I can not explain why they never did want it until 1923, because I did not know their business. I mean, here were a group of men—six of them—all administering or most of them as presidents of various steel companies, with all of the ramifications that they involve. Now, they gathered together and they said, "We want this many tons out of there." I have seen them change their minds two or three times in six months, but it would be pure supposition on my part to try

to say what factors determined them in setting that tonnage. Of course, you have always to remember that in this situation here you had a lot of stockholders who wanted to agree—I mean, one fellow, if he found that the majority wanted a certain thing, if he possibly could he would agree with them, and then he would go out and arrange his own affairs accordingly.

147 As to making any estimate of the probable life of this mine as a whole, you can divide tonnage by any production that you like, and, of course, you get all kinds of lives to it, and then you can take this affidavit, which is as near as I ever came to it. When you commence to talk about these forties out to the west of there, in section 18 over in Itasca County, there is no basis whatever to go on. This affidavit is the first real attempt that I ever made at determining the life. We did make an estimate of the glacial drift on top of the ore in tracts 3 and 4. I did exactly as you indicated. We went and observed around the periphery of these properties, and arrived at what the over-burden was. We took drill holes such as we had, and found out what there was in those, and on that basis we made an estimate. We did make an estimate of the ore body itself in that affidavit. I think you will find that estimate, if my recollection is correct, is the same as the Minnesota Tax Commission used.

In my reports to stockholders, I did not find it necessary to estimate the future life of the property. You see when you are dealing with such a large ore body as that, if you predicate your operating conditions for ten or twelve years ahead, that is as far as you need to go. There is no use of your going further, because you get into the realm of uncertainty, where you accomplish nothing. Coming back to that blueprint there, there are some of these drill holes that do not go to the bottom of the ore body at all. I remember one that went down for about 75 feet, and then it stopped at a given level.

148 I found it necessary to forecast into the future for 10 or 12 years operation. We had to make sure we had ore enough uncovered of a proper grade, and all that kind of thing, to cover the period such as we could prepare for. In the conduct of the appropriation, it was necessary that I should make my estimates on from 10 to 12 years in the future.

We would not have the same uncertain factors confronting us in estimating 12 years into the future that we would if we tried to go further into the future, because in the 10 or 12 years that you are dealing with—you are not trying to delimit, to set the final limits of your tonnage. For instance, in that property, you sometimes work five or six or seven or eight years, and you only lower yourselves 25 feet, or maybe, at the most, 50 feet in that length of time; so there is a difference there between the estimate that an operator might make for the purpose of laying out his operations and an estimate that an individual is setting of the total tonnage in the property.

"Q. Well, I will ask you other questions. You did consider it practical and feasible to attempt to forecast the future requirements of the ore for 10 or 12 years, did you?—A. Yes.

"Q. Could you have gone as far as 15 years?—A. I suppose you might; yes.

"Q. Well, what about 20 years?—A. Yes; I think you could have done that.

"Q. What about 25 years?—A. Well, I don't know.

"Q. You begin to get doubtful at 25 years?—A. I do.

149 "Q. So that, somewhere between 20 and 25 years, you think it is impractical to attempt to estimate the future requirements in ore?—A. Wait a minute, Mr. Mitchell. You are trying to lead me into something, and I am trying to tell you my story here the best way I can. Now, you asked me—you say, could you do it for 15 years; could you do it for 20 years? Think of the things that are involved in that. How do I know that this mine will not be producing 4,000,000 tons 15 years from now? It all depends upon the assumptions that I make.

"Q. Well, is it not necessary——A. The facts are—well, all right; you go ahead.

"Q. Is it not necessary in the conduct of this business to make assumptions based on your very best judgment?—A. Yes; it is."

Upon redirect examination J. C. AGNEW further testified:

Referring to my affidavit dated May 8, 1921 (Exhibit C), tracts 1, 2, 3, and 4 mentioned therein did not contain all of the ore properties of this company as of 1916. There were about 10 forty-acre tracts that were not contained in tracts 1, 2, 3, and 4. There had not been any exploration on those tracts to any appreciable extent. I don't think you could say there was none. I think there were a few tests, but nothing that you could call exploration. They were mineral lands, so acquired and so held by the company. As far as I know, nobody in 1916 or up to to-day had any definite idea of the

150 extent of ore under those properties that are not so included in this affidavit.

Referring again to the same affidavit, and referring now in the same connection to Exhibit B as to tract No. 1, I am to be understood as having said that all of these forties had been thoroughly explored except the two extreme ones and a little bit of one of the others. Tract 2 is very well explored, I would say. Tract 1 is where the main operating property is located. As to tracts 3 and 4, the estimates contained in my affidavit are based on all the data that we could accumulate from adjoining properties, plus whatever information we could gain from the drilling. I think, as I recollect it, about two or three years after the tax commission took and changed the valuation of that property. We drilled a couple of those forties, about five holes to the forty, the idea being that we felt it would be unwise to continue to pay on such tonnage unless we could reason-

ably assume it was there. These 28 holes, coupled with the information that could be obtained from the outside, led us to believe that that estimate could not be lowered, and therefore we quit. I do not think we drilled all of those forties. That is my recollection. My recollection further is that there were some exploring operations carried on with respect to tracts 3 and 4 after 1916 and before this estimate in the affidavit of 1921. I am quite sure that the estimate of content as to tracts 3 and 4 is exactly the same as the Minnesota Tax Commission figures. That is where I think I got them
151 originally. That is, the Tax Commission of Minnesota assigned a tonnage to each one of those forties. Of course, we carried that along on our records, where they reported it to us every day, and we did this little drilling to find whether it was possible to refute any of these estimates, and we found it was not. We stopped drilling, and I think those are the figures we used. I am pretty certain of it. In speaking of refuting those estimates, I mean by that whether they were too high.

"Q. Now, referring to a part of this affidavit, respondent's Exhibit C, which you have read from, and concerning which Mr. Mitchell asked you some questions, from the information at hand as of March 1, 1913, you would estimate that tract No. 1 only could produce 2,300,000 tons for a period of 25 years, and so forth, that estimate having to do with the production. State whether or not that was made from an operating standpoint.—A. Well, yes; it was made—I was certain that it was possible for the property to do at least that, if I make myself clear, and I was not making a statement there that, in my judgment and to my knowledge of the property, it could not be performed.

"Q. Now, in answer to one or two of Mr. Mitchell's recent questions as to the necessity of making estimates for a period of 10 or 12 years—I believe that is the expression used—state whether those estimates were made from an operating standpoint.—A. They were.

"Mr. MITCHELL. Would you mind defining that a little bit more?

152 "Mr. FORD. The capacity of the mine rather than outside business conditions and all the other various elements.

"Mr. MITCHELL. I see."

In making these 10-year and 12-year estimates and in what I said in my affidavit I took into consideration other factors besides mine capacity. I had to take into account two things. One was the varying requirements of these stockholders, who might come and call on this property for a very large tonnage of ore, and occasionally as they did come in, in the middle of the summer, and change their minds and want the production stepped up. Then I also had to take into account changes in their requirements as to grades of ore, which would involve mixing, and accessibility to the different parts of the mine, where the different qualities of ore occurred. It was my duty as manager of that mine always to be ready for whatever they would ask for.

Upon recross-examination, J. C. AGNEW testified as follows:

In making my estimates, as set out in my affidavit, that the mine could produce 2,300,000 tons a year, I was not referring solely to the capacity of our mine when I made that statement. This statement was made up for depletion purposes, and I know there was considerable discussion of this proposition, as to how this depletion would be handled, what the tonnage would be, and all that kind of
153 thing, and my recollection of it is that this 2,300,000 tons was arrived at in that way, taking into account what other people might want us to do and what the mine could do and weighing all the various factors.

It was not my best estimate of the probable future production. It is one estimate of the life of this mine, of the annual production of this mine. I have made estimates, as I told you, on various bases, that I must be prepared to meet various demands for tonnage of the mine; the mine must always be prepared to do that. If that had been an estimate of the ultimate annual capacity of the mine, I expect I probably would have put down five or six million instead of 2,300,000, but I would not put it down for that length of time. If anybody had asked me what that mine could produce as of 1914, I could have said five or six million tons a year.

"Q. There is just one thing I want to get straightened out on. I understood you to say, referring to those eight forty-acre pieces that are in a row, that the middle six of those were susceptible of a reasonably accurate estimate of the ore content, and that the two end quarters were not. Did I understand you correctly?—A. Yes.

"Q. Now, I want to call your attention to your testimony given in the hearing of the appeal of Julia Andrews Bruce.

"Mr. TOMPKINS. What page?

"By Mr. MITCHELL:

"Q. On page 28 of that record, the last five lines of that
154 page, and I ask you if you did not say that there was one forty which lies east of the six middle forties on which a reasonable estimate could be made?—A. That is in the record there, and if it is there, I probably said it.

"Mr. FORD. Read after that, Mr. Mitchell.

"Mr. MITCHELL. He is reading here——

"Mr. FORD. Well, let him read the testimony.

"Mr. MITCHELL. Suppose you read your answer.

"The WITNESS (reading):

"'Why, I would say that as to approximately the actual operating area for this purpose we will call six forties, or 240 acres that was developed. There was one forty which lies east of the one there; I think a reasonable estimate could be made—forty to the west, would be more in doubt. There was an additional 60-acre tract which lay not far from the present operation, where a reasonably accurate estimate could be obtained, but the rest of the property would be a matter of just judging.'

"By Mr. MITCHELL:

"Q. So, on your former testimony, you said, in effect, did you not, that the——A. If that is in the record, I said it.

"Q. (continuing.) That the east forty in the row of the eight forties was susceptible of a reasonable estimate of ore tonnage?—A. If that is in the record, I said it."

155 The foregoing was all of the evidence introduced on behalf of petitioner in this cause.

Respondent, thereupon, introduced certain evidence as follows:

E. J. STACK having first been duly sworn as a witness on behalf of respondent, on direct examination testified as follows:

My name is E. J. Stack. I am a mining engineer, and I am employed by the Government as a valuation mining engineer. Including the time at college I have been a mining engineer about twenty years. I valued properties on the Mesaba Range and other properties in the Lake Superior district ever since I have been with the Government. In fact, I have not done anything else but appraise properties in the Lake Superior district since 1922. I have traveled over the district, but once or twice I examined the different properties. I have examined and reported on ore mines owned and operated by Butler Brothers, Marquette Iron Company, the Hull Rust, and Mahoning properties, and some other smaller ones, which I have forgotten. I personally examined the properties of the Mahoning Ore & Steel Company in 1925.

"Q. Did you have any part in arriving at the commissioner's ore estimate of approximately 83,000,000 tons and a life of 45 years, as of March 11, 1916?—A. Well, I examined it, and I think in the spring of 1925 I made an appraisal. The ore estimate used in my

156 appraisal was identical with the one used in the present valuation. The life of the mine used in my appraisal was 42 years.

* * * * * * *

In finding the ore tonnage and the probable life of a mine, such as the Mahoning mine, we estimate the ore reserves, and in computing the ore reserves we get all available data, such as drill records, underground development work, shafts, prospects, and so forth, and surface indications, together with any information that might be obtained from operations on the adjoining properties. We quite often refer to estimates by the State of Minnesota as a check against the estimates used in the unit to verify our estimates. The investigations conducted by the State of Minnesota are considered among mining men very reliable as to the tonnages and the estimates of the ore reserves, but I do not know about their estimates as to the life of mines. I have no information about their estimates of probable life or their values. The Mahoning mine is one of the leading and largest iron-ore properties; that is, combined with the Hull Rust mine it is one of the largest producers of iron ore in the country. That combined property comprises one big pit, about two miles long

and three-quarters of a mile wide. I do not know of any active ore property in the world larger than that in 1916. There were some inactive, undeveloped ore regions. I would say that in 1916 it was the largest developed iron mine in the United States.

The iron-ore formation on the Mesaba Range is a well-de-
157 fined formation. At this particular occasion they have a well-defined foot wall, regular, uniform foot wall, outcropping just north of the Mahoning tract No. 1, inclined at an angle of about 11 or 12 degrees, reaching a depth on the south side of this tract 1 of about a hundred feet; and underneath there is a sedimentary formation. Above this foot wall is the iron ore of very good grade; in fact, one of the best grades of iron ore in the United States, about 60 per cent iron and very low in phosphorus. Above the iron ore is the surface of overburden of glacial drift varying from 5 to 20 or 30 feet thick.

The method of mining typical in that neighborhood is strip mining. Drag lines and every form of steam shovel are used in removing that overburden. That is hauled away from the property, and the ore removed by the steam shovels.

It is feasible to estimate the ore content. You can make a very accurate estimate of it. I would say the degree of accuracy obtained in estimating ore reserves in this property would be much higher than at any other mine that I know of, because of the geological conditions and the development of the drill work, and the activity of adjacent properties. It is much easier to make a more accurate estimate of the Mahoning reserves than it is of others, because of mining conditions, the geological formation and the types and quality and character of the ore. Compared with the estimates of ore reserves in nonferrous metal mines, such as are found in Montana and Idaho—the estimate on the Mesaba Range was considerably more accurate. There
158 is really no comparison. I do not know of any mining section on which it is easier to estimate the ore reserve than it is on the Mesaba.

I am familiar with the book, "Report of the Minnesota Tax Commission, 1914," and particularly the sections of that book dealing with Minnesota iron ore properties. The sections of that book dealing with Minnesota iron ore properties are regarded as authoritative scientific utterances.

Thereupon, attorney for respondent read from page 79 of said report the following:

"It was apparent to the commission that with the unusual character of the Mesaba ore deposits, being contained in detached rock basin of greater or less extent and covered by a glacial drift overburden of a few feet to not over 200 feet, it was only a matter of sufficient churn and diamond drilling, test pitting, and other exploration and development work, and a plotting of the result for each five feet of drilling, to calculate the quantity and grade of each layer of iron ore, and to obtain the total tonnage and its general average grade."

He further read from page 82 of said report the following:

"Minnesota is especially fortunate in having its mineral wealth deposited in such form that it can be accurately measured and
159 valued, and is probably the only State that has carefully measured the known iron-ore deposits, and is assessing such wealth on a strictly legal basis."

(The witness then continued his testimony as follows:)

Except for the very last statement dealing with the method of assessing this wealth, I agree with the statements just read. I have no information one way or the other as to how Minnesota assesses this wealth, whether it is fairly done or otherwise. I think that the commissioner's estimate of a probable life of 45 years for this mine is a very accurate estimate as of March 11, 1916. As to the factors that enter into such an estimate, in underground mines, the physical capacity is quite important; but if it is a large open pit, it is not. There are other elements more important—economic conditions, especially in the steel industry, and the number of properties operated by the company operating this particular mine also has a very important bearing, together with the terms of the leases as compared with other leases, and the local conditions of this mine; that is, it may be to the operating company's advantage to curtail operations at one mine and increase them at another. I have knowledge of several sales of iron-ore properties since March 1, 1913. The Meyers mine on the Mesaba Range was sold in 1917. The Kosmerl mine on the Mesaba was sold January 1, 1913. The Kosmerl mine was sold to the United States Steel Company. The owners received
160 promissory notes payable over a term of years, about 30 or 40 years. I do not remember whether there was any cash involved or not. Those notes were for fixed amounts, independent of the time. The total sale price was computed by estimating the ore reserves, multiplying that by the royalty rate, which was 25 cents, I think, or 40 cents—there were about 10,000,000 tons—and making the total sales price of about $4,000,000, to be received over a period of 40 years, in equal annual payments. The total sales price was based upon the estimates of ore content and probable life. That case was involved in a proceeding before this board. The name of the appeal was the Ruth Iron Mining Company. The Donora mine on the Mesaba was sold in April, 1913, on the same basis and the same terms as the Kosmerl sale; i. e., promissory notes, based on estimates of probable life and royalty rate existing under the lease. Higgins No. 1 and No. 2 were sold in 1917. The consideration for that sale was similar to the others. That was paid for again in promissory notes. Other sales were the Ray Prospect, Gilbert in 1917, and the Midway in 1913. I don't recollect just exactly how the consideration was arrived at for the first property. The sales price was arrived at in the same way, but I think the majority of these sales were based on ore estimates at the date of sale. I do not know

of any iron properties sold where the sale price was fixed on any other basis than estimates of ore content and probable life. I regard the Kosmerl transaction as a typical transaction. Another
161 mine that I did not mention is the Tener, which was sold in 1922. That is on the Mesaba Range also.

Upon cross-examination said E. J. STACK further testified:

I did not say that the first trip I ever made out to this Mahoning property was in 1925. I said I examined the property at that time. I have been over the adjoining properties; 1925 was the only time I have been on that property.

I had no part in fixing the valuation that the Commissioner of Internal Revenue arrived at in this particular case. I do not know whether there was any one year down to 1926 in which the Mahoning mine produced exactly 1,841,300 tons. The production varies very greatly from year to year. The annual production over the period from 1913 to 1926 fluctuated from year to year. When the commissioner estimated in this case that the life of this mine would be 45 years, that was based on the assumption that the mine would produce an average annual production of 1,841,000 tons.

"Q. If the annual production, in fact, was not 1,841,000 tons, then the assumption as to a 45-year life would be changed, would it not?—A. Not necessarily.

"Q. Not necessarily?—A. No, sir.

"Mr. MITCHELL. You are speaking of the average production or the average annual production?

"Mr. TOMPKINS. I am speaking of the fact that if the mine
162 produced, we will say, 500,000 tons or more annually each year you would have to assume a different life than 45 years from March 11, 1916.

"The WITNESS. If the average annual production was any other than 1,841,000 tons, it would change the life, certainly.

"By Mr. TOMPKINS:

"Q. As a matter of fact, did the commissioner, in deciding these cases, have any expert make a personal examination of this Mahoning property, or did he not rely upon the figures which he had obtained from the Mahoning Company and which had been used for purposes of fixing the depletion rate for that company?—A. That valuation was made before my time in the unit.

"Q. You do not know anything about that?—A. No.

"Q. Don't you know that since this case was decided by the Commissioner of Internal Revenue the commissioner has fixed, in a depletion proceeding, a different life, a different annual production for this Mahoning mine than that upon which he decided this case?—A. As of the same basic date?

"Q. Yes.—A. He did not; not to my knowledge.

"Q. Not to your knowledge?—A. No.

"Q. That appears in the stipulation. You referred here, Mr. Stack, to a number of sales of different ore properties made during

the period from 1913 to 1917. As I understand it, in all those
163 properties, the prices which the purchasers were to pay for the properties was fixed, only the price was not paid in cash; it was paid by a series of promissory notes, each for a fixed amount, and extending over a period which you say was estimated to be the life of the mine. Is that true?—A. Well, the sales price was arrived at by taking into consideration the estimated tonnage, the operating life, and royalty rate. Now, whether those promissory notes extended over the same period, I could not say."

I did not play any part in the negotiations leading up to those sales; I know nothing of them of my own knowledge. In most of them the sale price was fixed and definite and paid for by promissory notes.

"Q. Do you know of any case in which stock in an ore company such as this—and I call your particular attention to the fact that I used the word 'stock,' not sale of ore property, but stock—was sold under a contract, in which the total amount which the sellers would receive under the contract was not fixed but indefinite?—A. I do not recall any right now.

* * * * * * *

"Q. Did you know, Mr. Stack, that of the mineral lands of the Mahoning Ore & Steel Company, there were somewhere between three and four hundred acres that had not been valued at all?—A. Three or four hundred acres of undeveloped land.

"Q. I beg your pardon?—A. Undeveloped land. We valued mineral land only.

"Q. You did not value that land?—A. No.

164 "Q. I see. Let me ask you another question, and then I will be through. When you said you valued—what kind of land only?—A. Mineral.

"Q. That is, you mean by that as to which complete exploration has been made?—A. Land which was known to contain minerals.

"Q. Do you want to take the position that three or four hundred acres were known not to contain minerals?—A. No; I am not taking that position.

"Q. Well, I just want to make it clear. By the term that you have used, by calling the other mineral land, I thought you meant to indicate this was not mineral land.—A. They were not referred to us for appraisals, because it was not known that they contained mineral as of that date.

"Q. In other words, whether or not they contained minerals, you do not know; is that correct?—A. I do not."

The three or four hundred acres that I have referred to were on the Mesaba Range. I think a few of those 40-acre tracts were near the edge of the Mesaba Range, and some of them were toward the center.

"Q. I say, it has been testified to here that this Mahoning property, the property which is leased to the Mahoning Company, con-

sisted of approximately slightly over a thousand acres of mineral land. You do not dispute that acreage, do you?—A. Not the acreage; no.

"Q. Not the acreage; it has also been stipulated in this case that the commissioner, in arriving at his estimate as to the life of the mine and as to the ore reserves, based that estimate
165 upon the content of recoverable ore in only approximately 620 acres out of the entire property leased by the company, and therefore that there must be four hundred and some acres in the property which had not been explored or taken into consideration in arriving at this estimate; is that true?—A. They were not included in that valuation."

Upon redirect examination E. J. STACK further testified:

The land on which the Government found mineral content is shown on Exhibit B. The Government did not find a mineral content for the remaining land which seems to be indicated on Exhibit A because it has no record of any mineral on those tracts. The commissioner has no information whatever that they contained any mineral. They are unproven as far as mineral content is concerned.

"Q. There has been some reference here to two appraisals by the commissioner. Are you familiar with the stipulation of facts which sets out those two appraisals?—A. Yes.

"Q. It is true, is it not, that one of those appraisals was as of March 1, 1913, and the other one was as of March 11, 1916?—A. Yes, sir.

"Q. The commissioner, as of March 1, 1913, estimated the probable life as 40 years and as of March 11, 1916, as 45 years. Are those appraisals consistent or inconsistent?—A. I consider those two appraisals very consistent.

"Q. Why do you say that?—A. Because they are made on
166 different basic dates, as of different basic dates. In each case you had a different set of facts on which to base the valuation."

In the later appraisal you had additional history of three years to consider. The production for those three years was slightly less than 2,000,000 tons a year, and during those three years the demand for iron ore was about the average.

Upon recross-examination said E. J. STACK further testified:

I say the production of this mine for three years preceding 1916 was slightly under 2,000,000 tons a year. The production for 1913 was about 1,500,000 tons. For the year 1914 it was about 1,212,287 tons. For the year 1915 the stipulation in evidence shows that it was 2,311,940 tons.

H. L. PARRISH, having been first duly sworn as a witness on behalf of respondent, upon direct examination testified as follows:

My full name is H. L. Parrish. My occupation is a valuation engineer in the Bureau of Internal Revenue. I am a mining engineer and have been in the mining business, including the years in school and working, from 1910. I have been on the ore property mined by the Mahoning Ore & Steel Company a good many times. In 1923 I worked on it and am familiar with the property. I am also familiar in a general way with the Mesaba Range, particularly with that part of it around Hibbing, and also some of the portions lying fur-
167 ther east and further west. My work in 1923 was largely in the examination of and surveying of the open pit around the mines in various parts of the Mesaba Range. I know that the ore content of every mine on the Mesaba Range that I had any connection with had been very fully estimated. I am not so certain as to what the probable life of any particular property may have been. That would depend upon the program of the operator. It is practicable for one conversant with all the facts to make an estimate of probable life.

Upon cross-examination said H. L. PARRISH further testified:

"Q. These estimated ore reserves of properties on the Mesaba Range you have testified to have been estimated for the purpose of fixing depletion rates for those companies up there as required by law; is not that true?—A. Not always so; no, sir.

"Q. Not always so?—A. What estimates are you referring to?

"Q. You have testified here, in answer to Mr. Mitchell, that the ore reserves of most of those properties on the Mesaba Range have been estimated and valued. Did you not testify to that?—A. I testified that they could be estimated and that they had been estimated; yes, sir.

"Q. And that they had been. As a matter of fact, all of them had been estimated for the purpose of fixing depletion rates for different companies; is not that true?—A. That is probably true, but I did not have that in mind in my answer.

168 "Q. And in order to fix those depletion rates you have to make some estimate of the ore reserves; is not that true?—A. That is true; yes."

The foregoing testimony of E. J. Stack and H. L. Parrish was all the testimony introduced on behalf of respondent in this cause.

True and correct copies of all of the exhibits referred to in the testimony and proceedings, except such as are fully set forth herein, are transmitted herewith and made a part of the statement of evidence, as if fully set forth herein.

Thereupon counsel for petitioner and counsel for respondent stated that they had no further evidence to present and submitted the case to the member of the United States Board of Tax Appeals hearing the proceeding.

The petitioner, Julia Andrews Bruce, tenders and presents the foregoing as a statement of the evidence in this case and prays that the same be approved by the United States Board of Tax Appeals and made a part of the record in this cause.

GEO. O. MAY,
CHARLES D. HAMEL,
R. B. GOODELL,
JOHN ENRIETTE,
Attorneys for Petitioner,
906 Southern Building, Washington, D. C.

Approved and agreed to.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue,
Counsel for Respondent.

169 Before United States Board of Tax Appeals

[Title omitted.]

Order approving statement of evidence

I hereby certify that the foregoing statement of evidence has been examined by me and found conformable to the truth and contains all of the evidence in said case in narrative form, the exceptions taken to rulings, and the proceedings had upon the trial of said cause. Where the testimony here is set forth in the form of questions and answers, it is so set forth that the evidence might be clearly understood.

It further appearing to the board that it is proper and necessary that certain exhibits, referred to in the statement of evidence and incorporated therein by reference, should be inspected by the United States Circuit Court of Appeals, it is hereby ordered that true and correct copies of said exhibits be transmitted by the clerk to said court in connection with the statement of evidence and transcript, as follows:

(1) Respondent's Exhibit A—Map showing location of Mahoning property.

170 (2) Respondent's Exhibit B—Map prepared from descriptions of Minnesota authorities.

(3) Respondent's Exhibit D—Map of tracts 1, 2, 3, and 4.

Said statement of evidence on the petition for review of Julia Andrews Bruce is hereby approved and signed and ordered to be made of record in the above-entitled cause, this 30th day of September, 1929.

(s) CHARLES P. SMITH,
Member, United States Board of Tax Appeals.

Now, October 3, 1929, the foregoing statement of evidence and exhibits certified from the record as a true copy.

[SEAL.] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

171 Before United States Board of Tax Appeals

[Title omitted.]

Præcipe for transcript of record

Filed Sept. 27, 1929

To the Clerk of the United States Board of Tax Appeals:

You will please prepare a transcript of record in this cause and on or before October 15, 1929, transmit the same to the clerk of the United States Circuit Court of Appeals for the Second Circuit, and include in said transcript, copies, duly certified as correct, of the following documents:

1. The docket entries of proceedings before the board in the above-entitled cause.
2. Petition for redetermination.
3. Respondent's answer.
4. Findings of fact and opinions of the board, promulgated June 14, 1928.

172 5. Order of redetermination, entered June 15, 1928.

6. Petition for review by the United States Circuit Court of Appeals for the Second Circuit, filed December 13, 1928.
7. Statement of evidence.
8. This præcipe for transcript.

In addition to the foregoing documents, please transmit in connection with the transcript of record, certified copies of orders enlarging the time for the transmission and delivery of documents in accordance with the rules of the United States Circuit Court of Appeals, which orders are dated, respectively, February 13, 1929, March 20, 1929, May 31, 1929, June 24, 1929, August 1, 1929, August 30, 1929, and September 16, 1929.

Said transcript to be prepared as required by law and the rules of the United States Circuit Court of Appeals for the Second Circuit.

Charles D. Hamel,
John Enriette,
Attorneys for Petitioner.

C. M. Charest,
General Counsel, Bureau of Internal Revenue,
Attorney for Respondent.

Now, October 3, 1929, the foregoing præcipe certified from the record as a true copy.

[seal.]

B. D. Gamble,
Clerk, U. S. Board of Tax Appeals.

173 In United States Circuit Court of Appeals, Second Circuit

JULIA ANDREWS BRUCE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

Order substituting party respondent

Nov. 26, 1929

Upon the annexed stipulation, it is

Ordered that this cause be, and it hereby is, revived in the name of Robert H. Lucas, as Commissioner of Internal Revenue, and he hereby is substituted in this cause for the former Commissioner of Internal Revenue, David H. Blair.

WM. PARKIN, *Clerk.*

174 In United States Circuit Court of Appeals for the Second Circuit

[Title omitted.]

Stipulation re substitution

It is hereby stipulated and agreed by and between the petitioner in the above-entitled cause and Robert H. Lucas, as Commissioner of Internal Revenue, through their respective attorneys, as follows:

That since the filing of the petition for review in the above-entitled cause David H. Blair, who was at that time Commissioner of Internal Revenue and who was the respondent at that time in the above-entitled cause and had been Commissioner of Internal Revenue since the appeal was originally filed in the United States Board of Tax Appeals at Washington, D. C., has resigned as said Commissioner of Internal Revenue, and his resignation has been duly accepted;

That David H. Blair ceased to be Commissioner of Internal Revenue on the 31st day of May, 1929;

That Robert H. Lucas was duly appointed as Commissioner of Internal Revenue to succeed the said David H. Blair, and has duly qualified as said Commissioner of Internal Revenue;

That on June 1, 1929, said Robert H. Lucas became Commissioner of Internal Revenue, and ever since that time has been, and now is, Commissioner of Internal Revenue.

It is further stipulated and agreed between the petitioner in the above-entitled cause and Robert H. Lucas as Commissioner of Internal Revenue, through their respective attorneys, that agreeably to this court, and in accordance with the law, this cause may be revived so that this action will be pending against the said Robert H. Lucas, as Commissioner of Internal Revenue, and that said Robert H. Lucas,

as Commissioner of Internal Revenue, may be substituted
175 as the respondent in this cause for the said David H. Blair, formerly Commissioner of Internal Revenue;

That there is substantial need for so continuing and maintaining this cause, because if it is not so continued and maintained the order of the United States Board of Tax Appeals, for the review of which the petition for review in this cause was filed, will become final; the tax found by the said Board of Tax Appeals to be due will be assessed and collected from this petitioner without recourse to further contest its legality, or obtain a refund thereof.

It is further stipulated and agreed by and between the petitioner in the above-entitled cause and Robert H. Lucas, as Commissioner of Internal Revenue, through their attorneys, that the service of notice of the motion to revive this action in the name of Robert H. Lucas, as Commissioner of Internal Revenue, and to have his name substitutee as respondent in this causem is hereby waived; and the said Robert H. Lucas, as Commissioner of Internal Revenue, by and through his attorney, consents that an order may be made forthwith by the court reviving this cause in the name of Robert H. Lucas, as Commissioner of Internal Revenue, and substituting him as respondent in this cause for the former Commissioner of Internal Revenue, David H. Blair.

R. B. GOODELL,
Attorney for Petitioner.
C. M. CHAREST,
General Counsel, Bureau of Internal Revenue,
Attorney for Respondent, Robert H. Lucas,
as Commissioner of Internal Revenue.

176 In United States Circuit Court of Appeals for the Second Circuit

No. 216—October term, 1929

Argued April 16, 1930. Decided May 19, 1930

Appeal from the United States Board of Tax Appeals

Before MANTON, SWAN, and AUGUSTUS N. HAND, Circuit Judges

JULIA ANDREWS BRUCE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Opinion

Petition to review an order of the United States Board of Tax Appeals which affirmed the respondent's determination of defi-

ciencies in income taxes for the calendar years 1918 and 1919. The taxpayer appeals. Order reversed.

Raymond B. Goodell, of New York City, for petitioner.

G. A. Youngquist, Asst. Atty. Gen., and J. Louis Monarch and John Vaughan Groner, Sp. Assts. to Atty. Gen. (C. M. Charest, Gen. Counsel, Bureau of Internal Revenue, and Allin H. Pierce, Sp. Atty., Bureau of Internal Revenue, both of Washington, D. C., of counsel), for respondent.

MANTON, *Circuit Judge.*

This petitioner owned 350 shares of stock of the Andrews & Hitchcock Iron Company, which she owned prior to March 1, 1913, and sold on March 11, 1916, under the circumstances and terms referred to in the case of Logan v. Commissioner (C. C. A.) 41 F. (2d) —, decided this day. She also inherited 550/4000 interest from her mother's estate. The income in question was moneys received during two years, 1918 and 1919, as payment made pursuant to the contract obligation of the Youngstown Sheet & Tube Company to this petitioner. The same contract is involved. For the reasons there stated, it follows that the order of the board determining these moneys in part to be income and taxable was erroneous, and the order must be reversed.

Order reversed.

177 In United States Circuit Court of Appeals, Second Circuit

JULIA ANDREWS BRUCE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appeal from the United States Board of Tax Appeals

Judgment

Filed May 26, 1930

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be, and it hereby is, reversed.

It is further ordered that a mandate issue to the said board in accordance with this decree.

WM. PARKIN, *Clerk.*

178 [File indorsement omitted]

179 [Clerk's certificate to foregoing transcript omitted in printing.]

180 In the Supreme Court of the United States

Order extending time within which to apply for writs of certiorari

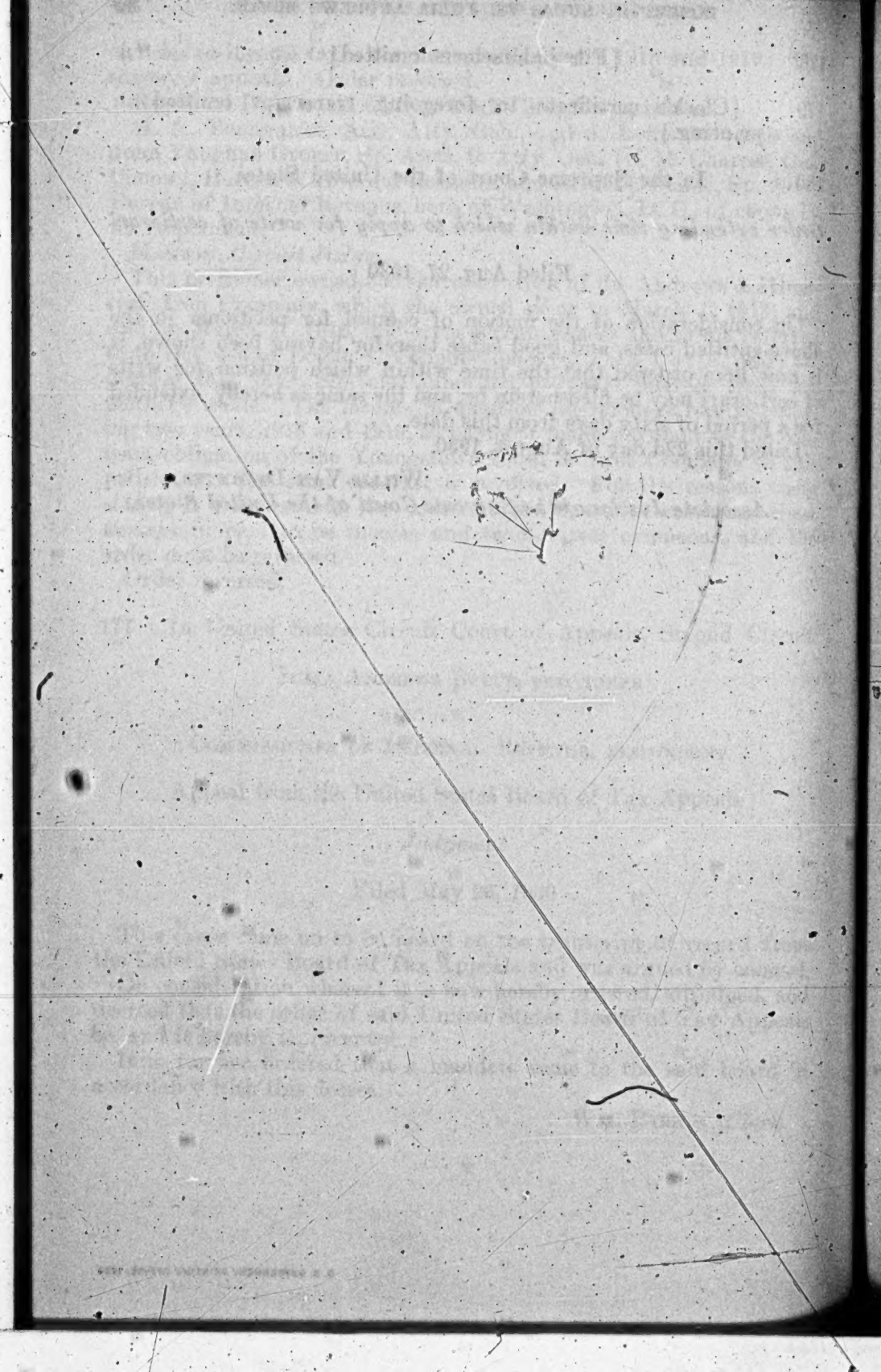
Filed Aug. 27, 1930

On consideration of the motion of counsel for petitioner in the above-entitled cases, and good cause therefor having been shown, it is now here ordered that the time within which petition for writs of certiorari may be filed herein be, and the same is hereby, extended for a period of sixty days from this date.

Dated this 22d day of August, 1930.

WILLIS VAN DEVANTER,
Associate Justice of the Supreme Court of the United States.

U. S. GOVERNMENT PRINTING OFFICE: 1930



Supreme Court of the United States

Order allowing certiorari—

Filed December 1, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.